TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 286.

JACK DAVIS, APPELLANT,

vs.

J. E. BURKE, SHERIFF OF CASSIA COUNTY, STATE OF IDAHO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO.

FILED MAY 18, 1900.

(17,768.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 5, 1900.

1 *Petition.*

In the Circuit Court of the United States in and for the Ninth Circuit and District of Idaho.

In the Matter of the Application of JACK DAVIS for a Writ of *Habeas Corpus.*

Petition for Writ of Habeas Corpus.

To the honorable the circuit court of the United States, ninth circuit, in and for the district of Idaho, central division thereof:

Your petitioner, Jack Davis, respectfully represents and shows to this honorable court that he is a citizen of the United States and a resident of the State of Idaho; that he is unjustly and unlawfully and in violation of the Constitution of the United States detained and imprisoned in the county jail of Cassia county, State of Idaho, by J. E. Burke, sheriff of said Cassia county, by virtue of certain proceedings, judgments, and orders hereinafter more fully referred to.

Your petitioner further shows that at the April term, 1897, of the district court of the fourth judicial district of the State of Idaho in and for Cassia county and on or about the 5th day of April, 1897, John C. Rogers, then the district attorney in and for said judicial district and county, filed in said district court a document in writing entitled as an "information," a copy of which document, with the endorsements thereon, is hereto attached, marked "Exhibit A," and is hereby made a part hereof.

Your petitioner further shows that he was held, placed upon his trial, and tried upon the charge of murder by virtue of and under said so-called information, and not otherwise, at the said April, 1897, term of said district court; that said trial was before a jury in and by said court empaneled and sworn to try said charge of
2 murder in so-called information alleged against your petitioner; that said trial was commenced on the 7th day of April, 1897, and proceeded from day to day until the 15th day of April, 1897; that on the 15th day of April, 1897, said jury made, rendered, and returned their verdict in said court, whereby they convicted and found your petitioner guilty of murder in the first degree, as charged in said so-called information, and thereupon and on the 24th day of April, 1897, the said court made, pronounced, and entered its judgment and commitment upon said verdict and thereby sentenced your petitioner to be remanded to the custody of the sheriff of said Cassia county and to be hanged by said sheriff on the 4th day of June, 1897, either within the walls of the county jail of said county or at some convenient and private place therein. A copy of said judgment, commitment, and sentence is hereto attached, marked "Exhibit B," and is hereby made a part hereof.

Your petitioner further shows that thereafter such proceedings were had that he did, on or about May 1st, 1897, make and file in said

court his motion for a new trial, which said motion was duly presented to said district court and by it, on or about the 6th day of January, 1898, overruled and denied; that in due time and as provided by law your petitioner took and perfected an appeal from said judgment, and also an appeal from the order of said court overruling his said motion and denying a new trial, to the supreme court of the State of Idaho, and that on or about the 15th day of June, 1898, said judgment of conviction and said order overruling and denying your petitioner's motion for a new trial was by said supreme court affirmed; that pending said appeal the execution of your petitioner was stayed by operation of law; that on the 12th day of September, 1898, at the September, 1898, term of said district court, the remittitur of said supreme court having been sent to, received by, and filed in said district court, to the effect that said judgment and order denying your petitioner a new trial be affirmed, the said district court resentenced your petitioner and issued its death war-
3 rant, by which order of resentence and death warrant said court ordered and sentenced your petitioner to be remanded to the custody of said sheriff and by him to be kept until the 28th day of October, 1898, and on that day by said sheriff to be hanged until dead, either within the walls of said county jail or at some convenient and private place in said Cassia county. A copy of said order of resentence and death warrant is hereto attached, marked "Exhibit C," and is hereby made a part hereof.

Your petitioner further shows that on or about the 25th day of July, 1898, he duly made, in accordance with and under the constitution and statutes of the State of Idaho, an application for pardon of and for said offense alleged in said so-called information to the board of pardons of said State; that on or about the 19th day of October said board of pardons, by its order, requested the governor of said State to reprieve your petitioner until December 16th, 1898; that on October 20th, 1898, said governor reprieved your petitioner until December 16th, 1898; that on the 5th day of December, 1898, said board, by its order, continued said application for pardon and reprieved your petitioner until the 1st day of February, 1899; that on the 23rd day of January, 1899, said board of pardons, by its order, denied said application for pardon.

Your petitioner further represents and shows that prior to the adoption of the constitution of the State of Idaho and prior to the admission of the Territory of Idaho as a State, on July 3rd, 1890, there was no law of or applicable to said Territory authorizing or permitting any person to be held to answer or prosecuted for a capital crime or for any felony unless on and except by indictment found by a grand jury duly empaneled and sworn, and by the law of said Territory such offenses were required to be prosecuted by such indictment and not otherwise.

That section 8 of article one of the constitution of the State of Idaho provides as follows:

"No person shall be held to answer for any felony or crim-
4 inal offense of any grade, unless on presentment or indictment of a grand jury or on information of the public prose-

cutor, after a commitment by a magistrate, except in cases of impeachment, in cases cognizable by probate courts or by justices of the peace, and in cases arising in the militia when in actual service in time of war or public danger; provided, that a grand jury may be summoned upon the order of the district court in the manner provided by law; and provided further, that after a charge has been ignored by grand jury, no person shall be held to answer or for trial therefor upon information of the public prosecutor."

That at the first session of the legislature of the State of Idaho a bill was introduced by said legislature, entitled "An act to provide for prosecuting offenses on information and to dispense with the calling of grand juries, except by order of the district judges," which said bill prescribed the mode of filing informations and the procedure relating thereto.

That said bill was pretended to be passed by said legislature and was presented to the governor for his approval and approved by him on March 13th, 1891, but said bill failed of enactment and was not passed by either house of said legislature and is not and never became or was a law or statute of the State of Idaho or valid or existing as a statute or law in any respect or for any purpose whatever, for the reason that said legislature in attempting and pretending to pass said bill neglected and failed to observe or comply with the provisions and requirements of section fifteen (15) of article three (3) of the constitution of the State of Idaho in the manner and particulars hereinafter mentioned and specified.

That all of the proceedings of said legislature of the State of Idaho in regard to the introduction, consideration, and passage of said so-called act and said bill and all things done relating thereto are shown by the journals of the two bodies, to wit, the senate and house of representatives, composing said legislature, and by the entries in said journals; that a full, true, correct, and complete transcript and copy of all of the journals and of all entries therein in anywise relating to said bill and covering and including each and all steps and proceedings touching the introduction, consideration, and passage thereof, duly certified by the secretary of said State, are hereto attached, marked "Exhibit D," and are hereby made a part hereof.

Your petitioner further represents and shows that on or about the 30th day of January, 1899, James H. Hawley, Esq., a citizen and resident of the said State and then and now an attorney and counsellor of this and of said supreme court and at all times herein mentioned the attorney and leading counsel of your petitioner, made and filed (because of the absence and inaccessibility of your petitioner and at his request and in his behalf) in the district court of the United States in and for the district of Idaho, central division, and before the judge of said court, at chambers, a verified petition for a writ of *habeas corpus*, wherein he set up and submitted, among other things, the facts aforesaid, and prayed that your petitioner be taken before said last-named court to do, submit to, and receive what the law might direct.

That the time within which said attorney for petitioner was re-

quired to prepare said application for a writ of *habeas corpus* and to obtain the exhibits thereto attached, a portion of which are attached hereto, was, as your petitioner is informed by said attorney and believes, inadequate to enable him to consider and examine the laws, precedents, and authorities bearing upon and in relation to the various important, complicated, and difficult constitutional and other questions involved in said application.

That on said 30th day of January, 1899, the judge of said United States district court, after argument of said attorney, made without adequate time, opportunity, or preparation, made its order and
6 judgment, whereby he denied said application and writ, and on the same day your petition-, through his said attorney, by the allowance of said judge, perfected an appeal from said order and judgment to the United States circuit court of appeals for the ninth circuit; that pending said appeal the execution of your petitioner was stayed by an order made by said judge on said 30th day of January, 1899; that on or about the 16th day of October, 1899, said United States circuit court of appeals made and rendered its decision in the matter of said appeal, whereby it adjudged that the question raised by said application for a writ of *habeas corpus* was whether your petitioner had been and was being deprived of his liberty and threatened with deprivation of life without due process of law, and contrary to the fifth — fourteenth amendments of the Constitution of the United States, in that the said district court of Idaho had no jurisdiction to try your petitioner on the said charge of murder under said or any information; that such question involved a construction of the Federal Constitution; that said circuit court of appeals was without jurisdiction in the premises because said appeal involved such construction. Accordingly said circuit court of appeals dismissed said appeal.

Your petitioner represents and shows that on the 23rd day of February, 1899, all of the laws of the State of Idaho relative to the incarceration and execution of persons convicted of capital offenses which were in force at the time of the homicide with which your petitioner was charged by said so-called information and when he was arrested, tried, convicted, and sentenced, as aforesaid, were repealed by an act of the legislature of said State entitled "An act providing for the conveyance and transportation of convicts from the place of conviction to the State prison, and regulating the time, place, and manner of infliction of the death penalty, and to
7 provide means for the execution of such penalty, and amending sections 8009, 8019, 8021, 8022 of the Revised Statutes of the State of Idaho; also amending sections 8008 and 8504 of the Revised Statutes of the State of Idaho, as amended by an act entitled 'An act providing for the conveyance and transportation of convicts from the place of conviction to the State prison,'" approved February 13th, 1899, which act was passed by said legislature, duly approved, and became a law of said State on the 23rd day of February, 1899.

That there is no other law of said State relating to the incarceration of persons convicted of felony or providing for the execution of

the punishment of death than the said act aforesaid, approved February 23rd, 1899.

Your petitioner further represents and shows that subsequent to the time when said last-mentioned act became a law the warden of the State prison therein mentioned took your petitioner from the custody of the sheriff of said Cassia county and into his own custody, and incarcerated and held your petitioner in confinement in said State prison, at Boisé City, in said State, in accordance with and for the purposes of the provisions and requirements of said act of February 23rd, 1899, until about the first of January, 1900, when said warden returned your petitioner to the custody of the sheriff of said Cassia county, which sheriff then took your petitioner back to and thence hitherto has confined and now holds him in the county jail of said county; that your petitioner has been imprisoned and deprived of his liberty at all times since his said conviction, as follows: Prior to the passage of said act of February 23rd, 1899, in the county jail of said Cassia county and by the sheriff of said county; subsequent to the passage of said act and until about the first of January, 1900, in the State prison at said Boisé City, and by the warden of said prison; ever since about the first of said January and now in the county jail of said Cassia county and by the sheriff of said county.

Your petitioner further represents and shows that he was
8 at all times prior to the passage of said act of February 23rd, 1899, threatened with deprivation of life by said sheriff, and thereafter and while he was so in the custody of said warden he was threatened with deprivation of life by said warden as provided by said act; that the judge of said fourth judicial district of the State of Idaho now threatens to again sentence your petitioner to death on or about the 2nd day of April, 1900, by then and in and as the said district court of said county making, entering, and issuing his and its sentence, commitment, and death warrant, and thereby ordering that your petitioner be hanged either by said sheriff or by said warden.

Your petitioner further represents and shows that his detention and imprisonment and threatened deprivation of life and all and singular the proceedings against him aforesaid are illegal, to wit:

First.

That he is and has been restrained of liberty, threatened with deprivation of life, and denied the equal protection of the laws, contrary to the constitutions of the State of Idaho and of the United States, and particularly in violation of the fifth and fourteenth amendments of the Constitution of the United States, in this:

That the district court of the fourth judicial district of the State of Idaho never acquired and did not have jurisdiction to hold your petitioner to answer or to try him for the offense charged in said so-called information, for the reason that there was no indictment or presentment found or presented to said court against your petitioner or information presented to said court against your petitioner under or upon which he could be legally held, tried, or convicted, in that—

The pretended law of the State of Idaho relating to informations,

hereinbefore referred to, approved March 13th, 1891, and found on pages 184 to 186, inclusive, of the Laws of the Third Session
9 of the Legislature of said State, is unconstitutional, illegal, and void and is not and never became a law of said State, for the reason that said bill aforesaid providing for the said alleged information act of March 13th, 1891, was never passed, as required by the mandates and provisions of section 15th, art. 3, of the constitution of the State of Idaho, and particularly for the reasons, among others, which your petitioner will urge:

(*a.*) That said bill, with the amendments thereto, was never printed; that neither the amendment thereto nor the bill as amended was ever printed for the use of the members of either the house or senate of said legislature; that said bill was put upon its final passage before it, with the amendments thereto, had been printed for the use of the members.

(*b.*) That said bill was not read on three several days in each house previous to the final vote thereon; that said bill as amended was never read in said house; that said bill as amended was not read three times in the said senate before the final vote thereon.

(*c.*) There was no case of urgency shown by any journal entries authorizing the said senate to suspend the constitutional provision of said section requiring bills to be read three times on three several days.

That the three several readings required by said section of said article of said constitution were never dispensed with.

(*d.*) That said bill on its final passage in said house was not read "at length" nor "section by section."

(*f.*) That on the final passage of said bill in said house the vote was not by yeas and nays.

(*g.*) That on the final passage of said bill in said senate the vote was not by yeas and nays.

(*h.*) That there was no yea-and-nay vote upon the final passage of said bill entered upon the journal of said house and the journal of said senate.

10 (*i.*) That a majority of the members present in the said house did not concur in said bill as amended by said senate; that said bill was never concurred in by a majority of the members present in each house of said legislature.

(*j.*) That said two houses never agreed or came to a common legislative intent as to the provisions of or on the passage of said bill.

Your petitioner epitomizes his objections and contentions so far as they relate to his being held to answer, tried, convicted of murder, and sentenced to be hanged under and by virtue of said information as follows:

1. That section 8 of art. 1 of the constitution of the State of Idaho is not self-executing, but required legislative action before it could become operative.

2. That the information act of March 13, 1891, was and is invalid and void because it was not passed in accordance with the requirements of the Idaho constitution.

3. That at the time of the homicide with which your petitioner

was charged and when he was tried, convicted, and sentenced, as aforesaid, there was no law in the State of Idaho for prosecutions by information in capital cases; the said district court of said State was without jurisdiction, and the trial, conviction, sentences, and proceedings aforesaid were illegal and void, and therefore

4. That your petitioner has been and is being restrained of his liberty and threatened with deprivation of life without due process of law and in violation of the fifth and fourteenth amendments to the Constitution of the United States.

Second.

Your petitioner further represents and shows that all of the statutory provisions of the State of Idaho applicable to the punishment of capital offenses or applicable to the punishment of your
11 petitioner when or after he was convicted of murder, as aforesaid, were repealed and absolutely obliterated by said act of the legislature of said State approved February 23rd, 1899.

That as to the place and manner of incarceration and executing the punishment of death, so far as the laws of said State provided for the same when the homicide of which your petitioner stands charged by said so-called information and when he was so tried, convicted, and sentenced, the following changes and additions applicable to your petitioner were made by said act of February 23rd, 1899, to wit:

(*a*.) Section 8009 of said act of February 23rd, 1899, hereinafter called the "new law," requires the warden to keep the convicted person in "solitary confinement" in the State prison until the infliction of the death penalty. The former and repealed law contained no such provisions.

(*b*.) By section 8021 of the new law your petitioner is denied and deprived of the right of having his friends, counsel, and ministers of his own choosing present at the time of his execution. By section 8021 of the repealed law he was entitled to have such persons present at said time. By said section 8009 of the new law visitation of all persons, save those enumerated therein and those only in accordance with arbitrary prison rules, is denied. The old and repealed law contained no such provision.

(*c*.) Section 8021 of the new law requires the warden to execute the death penalty within the walls of the State prison. The old and repealed law required the punishment of death to be inflicted by the sheriff of the county within the walls of the county jail or in some convenient private place in the county.

Your petitioner shows that the repeal of all statutory provisions of said State relating to punishment, as aforesaid, and the creation of new laws providing punishment, as aforesaid, resulted in at least the following changes and additions to the punishments in force when said homicide was committed, to wit:
12 1, solitary confinement; 2, denying visitation of all persons, save those enumerated by the new law and those under prison rules; 3, the ignominy of execution within the State penitentiary.

And herein your petitioner alleges:

First. That sending the petitioner to the State prison to be executed, keeping him there in solitary confinement until the infliction of the death penalty, denying visitation of all, save certain persons enumerated and these only in accordance with prison rules, and withdrawing from petitioner the rights and privileges conferred by the repealed law have each and all the effect of imposing upon him additional penalties and changing the manner and character of punishment to his prejudice.

Second. That the amending statute and existing law, having been passed since the commission of the alleged crime and imposing different and additional penalties and punishment and depriving petitioner of rights and privileges which he had at such time, is, as to him, an *ex post facto* law, and therefore contrary to sections 9 and 10 of art. 1 of the Constitution of the United States, as well as to sections 16 of art. 1 of the constitution of the State of Idaho.

Third. That the new law is, as to petitioner, inoperative, because it is *ex post facto*, in that it changes the manner of punishment, imposes additional punishment, and deprives petitioner of rights existing and available to him at the time of the homicide and when he was tried and convicted therefor.

Fourth. That the old law, being repealed, cannot be made operative for any purpose.

Fifth. That there is no law under which petitioner can be punish*ment* for his alleged offense, and therefore he is restrained of his liberty without due process of law, in violation of the fifth and fourteenth amendments to the Federal Constitution.

Recapitulation.

13 Your petitioner represents and shows that his detention, imprisonment, threatened deprivation of life, and all proceedings had and threatened against him are illegal and violative of the fundamental rights and immunities guaranteed by the Constitution of the United States, to wit:

1. There is not and never has been any indictment or presentment of a grand jury found against him, but he has been charged with a capital crime, to wit, murder, held to answer, imprisoned, tried, convicted, sentenced to be hanged, and is now threatened with death under and by virtue of the so-called information, of which said "Exhibit A" is a copy, and not otherwise.

That when the homicide with which your petitioner is charged and when the various proceedings hereinbefore enumerated were had against him there was no law of the State of Idaho authorizing or permitting a prosecution for a felony by information.

That said district court in all of its acts done and threatened, as aforesaid, against your petitioner has been and now is wholly without jurisdiction; that said district court never acquired the right or power to hold, imprison, try, convict, or sentence your petitioner, and considering the premises your petitioner has been and is being unlawfully detained and imprisoned and is threatened with death

without due process of law and in contravention of the fourteenth amendment of the Federal Constitution.

2. All of the laws of the State of Idaho providing for or applicable to the punishment of criminals convicted of capital offenses were repealed and rendered void subsequent to the commission of the offense alleged in said so-called information by an act of the legislature of said State, which was passed, approved, and became the sole law of said State relating to or providing for the punishment of persons sentenced to imprisonment in the State prison or to suffer the death penalty on the 23rd day of February, 1899.

That said last-mentioned act and law imposes different and additional penalties and punisl ment from those provided by the laws in force when the crime charged against your petitioner is alleged
14 to have been committed, deprives your petitioner of rights and privileges which he had at such time, and changes the manner and character of punishment to his prejudice, and therefore

Said act is, as to your petitioner, *ex post facto* and contrary to the provisions of sections 9 and 10 of art. 1 of the Federal Constitution.

That said district court is without jurisdiction to sentence or punish your petitioner either under the laws in force when said crime so charged is alleged to have been committed, because all of said laws have been repealed and no longer exist, or under said new law, because said law, as to your petitioner, is *ex post facto* and therefore inoperative and void.

Wherefore, to be relieved from said unlawful detention and imprisonment and to be released from custody, your petitioner prays that a writ of *habeas corpus*, to be directed to J. E. Burke, sheriff of Cassia county, in the State of Idaho, may issue in this behalf, so that your petitioner may be brought before this court to do, submit to, and receive what the law may direct.

JACK DAVIS,
Petitioner in propria persona.

J. H. HAWLEY,
J. W. DORSEY, AND
HAWLEY, PUCKETT & HAWLEY,
Of Counsel for Petitioner.

STATE OF IDAHO, } ss:
County of Cassia, }

Jack Davis, being duly sworn, deposes and says that he is the petitioner named in the foregoing petition subscribed by him; that he has read the same and knows the contents thereof, and the statements therein made are true, as he verily believes.

JACK DAVIS.

Subscribed and sworn to before me this 26th day of March, 1900.

[SEAL.]

JOHN F. HANSEN,
Clerk of the District Court,
By FRANK RIBLETT, *Dep-ty.*

15 "EXHIBIT A."

In the District Court of the Fourth Judicial District of the State of Idaho in and for Cassia County.

STATE OF IDAHO, Plaintiff,
vs.
JACK DAVIS, alias DIAMONDFIELD JACK, alias FRANK WOODSON, Defendant.

Information.

In the District Court of the Fourth Judicial District of the States of Idaho, Sitting in and for Cassia County, April Term, A. D. 1897.

Jack Davis, alias Diamondfield Jack, alias Frank Woodson, is accused by the district attorney of the fourth judicial district of the State of Idaho by this information of the crime of murder, committed as follows, to wit: That said Jack Davis, alias Diamondfield Jack, alias Frank Woodson, on the sixth day of February, A. D. 1896, in the county of Cassia, State of Idaho, in and upon one John C. Wilson did feloniously, wilfully, unlawfully, deliberately, premeditatedly, and of his malice aforethought make an assault *and* a certain pistol, to wit, a revolver, which said revolver was then and there loaded with gunpowder and leaden bullets, and which said revolver him, the said Jack Davis, alias Diamondfield Jack, alias Frank Woodson, in his right hand then and there had and held, wilfully, feloniously, unlawfully, deliberately, premeditatedly, and of his malice aforethought and with the intent him, the said John C. Wilson, then and there to kill and murder did then and there shoot off and discharge at, against, and upon him, the said John C. Wilson, inflicting then and there and thereby upon the body of him, the said John C. Wilson, one mortal wound, of which said mortal wound inflicted, as aforesaid, him, the said John C. Wilson, then
16 and there died, whereby at the time and in the manner and form aforesaid the said Jack Davis, alias Diamondfield Jack, alias Frank Woodson, did unlawfully, wilfully, feloniously, deliberately, premeditatedly, and of his deliberately premeditated malice aforethought shoot, kill, and murder said John C. Wilson, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Idaho.

That after the commission of said offense and before the filing of this information, to wit, on the tenth day of March, A. D. 1897, said Jack Davis, alias Diamondfield Jack, alias Frank Woodson, was arraigned upon said charge before W. L. Pierson, a justice of the peace in and for Albion precinct, Cassia county, State of Idaho, and a preliminary examination upon said charge was then and there waived by him, the said Jack Davis, alias Diamondfield Jack, alias Frank Woodson, and then and there the said Jack Davis, alias Diamondfield Jack, alias Frank Woodson, was held by said justice of the peace to answer the same in this court and was duly committed.

JOHN C. ROGERS,
District Attorney.

Names of witnesses known to said district attorney at the time of filing this information:

Henry Harris, Edgar Severe, P. D. Bell, J. W. Walker, Lowell Wilson, Jabez Durfee, Ed. Samuelson, Charles Parkinson, Henry Foxley, Adam M. Paul, William Majors, Richard O'Neal, Van Irons, William Thompson, John Boundy, D. D. Merritt, C. B. Moore, William A. Tolman, Bert Lee, Joel Sanders, Thomas E. Harper, William Trotter, Dr. R. T. Story, William Quin, Hervey Tranmer, Frank Smith, Aaron Critchfield, Joseph Wilson, E. R. Daley, C. T. Robinson, James O'Neal, Francis M. Cummins, Charles Edwards, Harvey L. Perkins, J. E. Bower, O. P. Anderson, Sandy Gee, Mrs. Aaron Critchfield, William Cramer, Alice Woods, Chester Dwight, Charles O'Neal, William Vail, James Dunn, Joseph McMurray, Mrs. Chas. Thompson, Hyrum Severe, William Drake, Chas. Ecklund,
17 Fred Wilson, Davis Hunter, Jessie Wilson, Oliver Dunn, Charles Thompson, J. J. Gray, Ed. Thompson, Geo. T. Porter, William Orr, Benj. Darrh, Heman Hunter, S. J. Nutt.

(Endorse:) Information. (Title of court and cause.) Filed in open court this fifth day of April, 1897. John F. Hanson, clerk.

STATE OF IDAHO, } ss:
County of Cassia, }

I, John F. Hansen, clerk of the district court of the fourth judicial district of the State of Idaho in and for the county of Cassia, do hereby certify that the foregoing is a full, true, correct, and complete transcript and copy of the original information in the case of The State of Idaho *v.* Jack Davis, filed in my office on the 5th day of April, 1897.

Witness my hand and the seal of the said district court this 26th day of March, 1900.

JOHN F. HANSEN,
Clerk of the District Court, Fourth Judicial District, State of Idaho,
By FRANK RIBLETT, *Dep-ty.*

[SEAL.]

(Stamp.)

18 "EXHIBIT B."

In the District Court of the Fourth Judicial District of the State of Idaho in and for Cassia County.

STATE OF IDAHO, Plaintiff,
vs.
JACK DAVIS, alias DIAMONDFIELD JACK, alias FRANK WOODSON, Defendant.

Judgment and Commitment.

Now, on this twenty-fourth day of April, 1897, the district attorney and the defendant and his counsel, Hawley & Puckett and K. I. Perky, Esqrs., came into court. The defendant was duly in-

formed by the court of the nature of the charge against him, for the crime of murder committed on the sixth day of February, 1896, of the information filed against him, his arraignment and plea of not guilty of the offense charged in the information, of his trial and the verdict of the jury on the fifteenth day of April, 1897, "Guilty of murder in the first degree, as charged in the information," and the defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which he replied that he had none; and no sufficient cause being shown or appearing to the court, therefore the court rendered its judgment as follows: That whereas the said Jack Davis having been duly convicted in this court of the crime of murder in the first degree, it is therefore ordered, adjudged, and decreed by the court that the said Jack Davis be punished by death, and that he be remanded to the custody of the sheriff of Cassia county, State of Idaho, there to be retained in his custody until the fourth day of June, A. D. 1897, at which time the said sheriff shall take the said Jack Davis, either within the walls or yard of said jail of said Cassia county or some convenient and private place within said county of Cassia and
19 State of Idaho, and hang said Jack Davis by the neck until he is dead.

C. O. STOCKSLAGER,
Judge Fourth Judicial District.

(Endorsed:) (Title of court and cause.) Judgment and commitment. Filed April 24th, 1897. John F. Hansen, clerk.

STATE OF IDAHO, } ss:
County of Cassia, }

I, John F. Hansen, clerk of the district court of the fourth judicial district of the State of Idaho in and for the county of Cassia, do hereby certify that the foregoing is a full, true, correct, and complete transcript and copy of the original judgment and commitment in the case of The State of Idaho *v.* Jack Davis, now on file in my office.

Witness my hand and the seal of the said district court this 26 day of March, 1900.

JOHN F. HANSEN,
Clerk of the District Court, Fourth Judicial District, State of Idaho,
[SEAL.] By FRANK RIBLETT, *Dep'ty.*

(Stamp.)

20 "EXHIBIT C."

In the District Court of the Fourth Judicial District of the State of Idaho in and for Cassia County.

STATE OF IDAHO, Plaintiff,
vs.
JACK DAVIS, Defendant.

Resentence and Death Warrant.

Whereas, on the tenth day of March, A. D. 1897, said Jack Davis was, upon a complaint duly sworn to, made, and filed, charged before W. L. Pierson, justice of the peace in and for Albion precinct, Cassia county, State of Idaho, with the crime of murder, in that he, the said Jack Davis, wilfully, feloniously, unlawfully, deliberately, premeditatedly, and of his own malice aforethought did kill and murder one John C. Wilson in the county of Cassia, State of Idaho, on the sixth day of February, A. D. 1896;

And whereas, on said tenth day of March, A. D. 1897, and after the commission of the said offense, as aforesaid, and before the filing of the information in said case, the said Jack Davis was arraigned upon said charge by said justice of the peace, and the preliminary examination upon said charge was then and there waived by him, the said Jack Davis, and then and there the said Jack Davis was held by the said justice of the peace to answer said charge in the district court of the fourth judicial district of the State of Idaho and was duly committed;

And whereas there was filed in open court in the district court in and for Cassia county, in the State of Idaho, on the fifth day of April, A. D. 1897, the same being the April term of the said court, duly and regularly appointed, had, and held, an information
21 against him, the said Jack Davis, which said information was duly signed by the district attorney in and for the county of Cassia, and charged and accused the said Jack Davis with having committed the crime of murder in the first degree, in that he, the said Jack Davis, on the sixth day of February, A. D. 1896, in the county of Cassia, State of Idaho, did unlawfully, feloniously, wilfully, deliberately, premeditatedly, and of his malice aforethought kill and murder one John C. Wilson, contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the State of Idaho;

And whereas, on the fifth day of April, 1897, said defendant was duly arraigned in court and said information was duly read to the said defendant and he was furnished with a copy thereof, and, on being asked by the court, stated that his true name was Jack Davis, and said court then ordered that all proceedings in said cause against said defendant be had in the name of Jack Davis, and the said defendant being fully advised in the premises and of the nature of said information, and then and there, on the fifth day of April, A. D. 1897, entered his plea of not guilty of the charge in the said information contained;

And whereas, on the seventh day of April, A. D. 1897, the said information and charge against the defendant was brought on for trial, and said defendant, being then and there duly represented in court by his counsel, Hawley & Puckett and K. I. Perky, and the said State of Idaho appearing by its counsel, Hon. J. C. Rogers, district attorney, and his assistants, W. E. Borah and O. W. Powers, Esqrs., and, said defendant having announced that he was ready for trial, a jury was duly and regularly chosen and empaneled to try said cause, and said cause was proceeded with from day to day up to and until the fifteenth day of April, 1897, and the evidence being then closed and the arguments of counsel having been made, and the court having charged the jury and the jury retired in the charge of the officers of the court for that purpose duly selected and
22 sworn, retired from the court, and, after having been absent for a time, returned into court and rendered their verdict against the said defendant, Jack Davis, of guilty of murder in the first degree, as charged in the information aforesaid;

And whereas, on the twenty-fourth day of April, A. D. 1897, said defendant, Jack Davis, having been brought into court for the purpose of judgment and sentence, and said defendant being there in open court represented by his counsel, Hawley & Puckett and K. I. Perky, and the State of Idaho being represented by the district attorney in and for the county of Cassia and district aforesaid, and the defendant having been then and there duly informed by the court of the nature of the charge against him as in said information contained, in that he committed the crime of murder on the sixth day of February, 1896, and the said defendant being also informed of his arraignment and plea of not guilty of the offense charged in the information, of his trial, and the verdict of the jury made and rendered on the fifteenth day of April, A. D. 1897, finding him, the said defendant, guilty of murder in the first degree, as charged in the information, and the said defendant having been then and there asked if he had any legal cause to show why judgment should not be pronounced against him, and he, the said defendant, Jack Davis, replying that he had none, and no sufficient cause being then and there shown or appearing to the court, thereupon said court rendered its judgment and sentence as follows, to wit:

That whereas the said Jack Davis having been duly convicted in this court of the crime of murder in the first degree, it is therefore ordered, adjudged, and decreed by the court that the said Jack Davis be punished by death, and that he be remanded to the sheriff of the county of Cassia, of the State of Idaho, there to be retained in the custody of the said sheriff until the fourth day of June, A. D. 1897, at which time said sheriff shall take said Jack Davis, either
23 within the walls of the yard of the jail of the said county of Cassia or to some convenient and private place within the said county of Cassia and State of Idaho, and then and there on said day hang said Jack Davis by the neck until dead.

And whereas thereafter and on the first day of May, 1897, a motion for a new trial was duly filed in said district court, and afterward, to wit, on the sixth day of January, A. D. 1898, was heard, considered, and overruled by said court, and thereafter, to wit, on

the eighteenth day of January, 1898, an appeal was perfected to the supreme court of the State of Idaho, and thereafter, to wit, on the fourteenth day of June, A. D. 1898, a remittitur from the supreme court of the State of Idaho was filed with the clerk of this court to the effect that the judgment and the order denying the defendant a new trial by the court below be affirmed, and thereafter, to wit, on the fourteenth day of July, A. D. 1898, a second remittitur was filed from the supreme court of the State of Idaho with the clerk of this court denying the petition of appellant for a rehearing of the above-entitled cause;

And thereafter, to wit, on the thirteenth day of September, A. D. 1898, it being the regular September term of the district court in and for said Cassia county, the time for sentence of the defendant, Jack Davis, for the crime, as aforesaid, was by said court fixed for Friday, the sixteenth day of September, A. D. 1898, at 1.30 o'clock p. m., and at said time said defendant was brought into court, the district attorney, John C. Rogers, and K. I. Perky and W. H. Puckett, counsel for the defendant, being present, the defendant, Jack Davis, was asked if he had any legal cause to show why judgment should not be pronounced against him, who nothing further sayeth unless as he before hath sayeth, and no legal cause or reason appearing to the court, thereupon the court rendered its judgment and sentence as follows, to wit:

That whereas the said Jack Davis having been duly convicted in this court of the crime of murder in the first degree, it is therefore ordered, adjudged, and decreed by the court that the said
24 Jack Davis be punished by death, and that he be remanded to the sheriff of the county of Cassia, of the State of Idaho, there to be retained in the custody of the said sheriff until the twenty-eighth day of October, A. D. 1898, at which time said sheriff shall take the said Jack Davis, either within the walls of the yard of the jail of said Cassia county or to some convenient or private place within said Cassia county and State of Idaho, and then and there on said day hang the said Jack Davis by the neck until dead.

And therefore you, the said sheriff of the said county of Cassia, in the State of Idaho, are hereby commanded to take said Jack Davis on the twenty-eighth day of October, A. D. 1898, within the walls of the yard of the jail of said county of Cassia and State of Idaho or at your convenience to some convenient and private place within said county of Cassia and State of Idaho, and thereupon and on the said twenty-eight- day of October, A. D. 1898, hang the said Jack Davis by the neck until he, the said Jack Davis, shall be dead; and thereupon you, the said sheriff, shall duly make due returns of all your actions and doings in the premises, and this shall be your warrant and authority therefor.

C. O. STOCKSLAGER.
District Judge Fourth Judicial District of Idaho.

Attest:

[SEAL.] JOHN F. HANSEN,
Clerk District Court.

Dated this twenty-second day of September, A. D. 1898.

25 STATE OF IDAHO, } ss:
County of Cassia, }

I, John F. Hansen, clerk of the district court of the fourth judicial district of the State of Idaho in and for the county of Cassia, do hereby certify that the foregoing is a full, true, correct, and complete transcript and copy of the original resentence and death warrant in the case of The State of Idaho *v.* Jack Davis, now on file in my office.

Witness my hand and the seal of the said district court this 26 day of March, 1900.

JOHN F. HANSEN,
Clerk of the District Court, Fourth Judicial District, State of Idaho.
[SEAL.] By FRANK RIBLETT, *Dep'ty.*

(Stamps.)

26 "EXHIBIT D."

House and Senate Journal Entries of House Bill No. 33.

An act to provide for prosecuting offenses on information and to dispense with the calling of grand juries, except by order of the district judges. Passed at the first—1890-'91—session of the legislature of the State of Idaho.

House Record.

Pages 128 and 129, January 7, 1891.

Introduction of Bills, Joint Resolutions, and Memorials.

Mr. Briggs introduced house bill No. 33, "An act to provide for prosecuting offenses on information and to dispense with the calling of grand juries except by order of the district judges."

Page 131.

First Reading of House Bills.

—— and house bill No. 33, by Briggs, "An act to provide for prosecuting offenses on information and to dispense with the calling of grand juries except by order of the district judges," read first time.

Pages 146, January 8, 1891.

Second Reading of House Bills, Joint Resolutions, and Memorials.

House bill No. 33, by Briggs, "An act to provide for prosecuting offenses on information and to dispense with the calling of grand juries except by order of the district judges," was read second time, ordered printed, and referred to the committee on judiciary.

Pages 169, January 12, 1891.

Mr. Steunenberg, from the committee on printing, submitted the following report:

27 Mr. SPEAKER: The committee on printing respectfully reports that it has had printed one hundred and fifty copies *each* of house bills Nos. 33, and herewith submit the original bills.

STEUNENBERG, *Chairman.*

Page 450, March 2, 1891.

Reports of Standing Committees.

Mr. Price, from the committee on judiciary, reported back house bill No. 33 with favorable recommendation. The bill was ordered engrossed and passed to third reading.

Page 455, March 3, 1891.

Mr. Steunenberg, from the committee on engrossment, reported house bill No. 33 correctly engrossed.

Page 456.

Third Reading of House Bill, J. R., & M.

House bill No. 33 was read third time. Question being, Shall the bill pass? the ayes and nays were taken with the following result: Ayes—Armstrong, Ballentine, Briggs, Caldwell, Casey, Dryden, Emery, Ethel, Frederickson, Goodnight, Green, Hawkins, Irwin, Jones, King, Martin, Merrill, Mills, Munro, Price, Pyeatt, Ramsey, Skattaboe, Smith, W. H. Smith, B. N. Sperry, Steunenberg, Suydam, Swanger, and Mr. Speaker—30; nays—Mr. Lyon—1. The bill passed with title approved.

Page 468, March 4, 1891.

Office of the secretary of the senate.

BOISÉ CITY, IDAHO, *March* 4, 1891.

Mr. SPEAKER: I am instructed to inform your honorable body that the senate has had under consideration and passed with amendments house bill No. 33, "An act to provide for prosecuting offenses on information and to dispense with the calling of grand juries except by order of the district judges," herewith transmitted.

28 Respectfully, M. C. ATHEY, *Sec.*

Page 471.

Mr. Briggs asked unanimous consent to take up house bill No. 33, which was agreed to.

The house having under consideration house bill No. 33, with the senate amendment thereto—

Mr. Briggs moved that the house do not concur in the amendment; that ayes and nays were taken with the following result:

Ayes—Messrs. Briggs, Emery, Frederickson, Goodnight, Hawkins, Irwin, Jones, King, Lyon, Martin, Merrill, Price, Ramsey, Smith, W. H. Sperry, Steunenberg, Suydam, Swanger, and Mr. Speaker—19; nays—Messrs. Ballentine and Green—2.

And so the amendment was disagreed to.

Pages 466 and 467, March 5, 1891.

Office of the secretary of the senate.

BOISÉ CITY, IDAHO, *March* 5, 1891.

Mr. SPEAKER: I am instructed to inform your honorable body that the senate has refused to recede from its amendment to house bill No. 33, "An act to provide for prosecuting offenses on information and to dispense with the calling of grand juries except by order of the district judges," and asks for a committee of conference to confer upon the difference between the two houses relating to said amendment.

Respectfully, M. C. ATHEY, *Sec.*

Pages 479, March 6, 1891.

The speaker appointed the judiciary committee as a committee of conference on the part of the house to confer with a like committee from the senate upon house bill No. 33.

29 Page 529, March 11, 1891.

Mr. Price, from the committee on conference, recommended that the senate amendment to house bill No. 33 be concurred in.

The amendment was concurred in.

Page 535, March 12, 1891.

The speaker announced that he was about to sign house bill No. 33.

Page 544, March 13, 1891.

Mr. Caldwell, from the committee on enrollment, reported house bill No. 33 correctly enrolled, and that the same was presented to the governor for his approval at 2.5 o'clock p. m., March 12, 1891.

Senate Record.

Page 91, March 3, 1891.

Message from the House.

Office of chief clerk of house of representatives.

BOISÉ CITY, IDAHO, *March* 3, 1891.

Mr. PRESIDENT: I am instructed to inform your honorable body that the house of representatives has had under consideration and passed house bill No. 33, "An act to provide for prosecuting offenses on information and to dispense with the calling of grand juries

except by order of the district judges," which is herewith transmitted.

Respectfully, CHAS. H. REED,
Chief Clerk.

Page 93.

House bill No 33 was read first time and referred to the committee on judiciary.

Page 97, March 4, 1891.

Reports of Standing Committees.

Mr. Wing, from the committee on judiciary, made the following report:

Mr. PRESIDENT: The judiciary committee has had under consideration house bill No. 33 and return the same herewith with amendment, and would recommend that the same do pass as amended.

WING, *Chairman.*

Pages 98 and 99.

Second Reading of Bills.

House bill No. 33 was taken up.

Mr. Wing moved that section 3 be amended by striking out the words "different offenses and different degrees of the same offenses may be joined in on information in all cases where the same might by different courts in one indictment," which motion prevailed.

Mr. Finch moved that the rules be suspended, the bill read a second and third time, and placed upon its final passage.

Roll-call.

Those voting in the affirmative were Messrs. Branstetter, De Lamar, Dempsey, Finch, Gunn, Jewell, Rogers, Shoup, Smith, Weiler, Wells, White, Wing, and Mr. President—14.

Negative—none.

Absent—Messrs. Brigham, Langrishe, McPherson, and Underwood—4.

So the rules were suspended; the bill was read the second and third time and placed upon its final passage.

The question being, "Shall this house bill pass?"

It was decided as follows:

Roll-call.

Those voting in the affirmative were Messrs. Branstetter, Delamar, Dempsey, Finch, Gunn, Jewell, Rogers, Shoup, Smith, Weiler, Wells, White, and Wing—13.

Negative—Mr. President—1.

Absent—Messrs. Brigham, Langrishe, McPherson, and Underwood—4.

So the bill passed, and the title was approved.

Pages 115 and 116, March 5, 1891.

Message from the House.

Office of chief clerk of the house of representatives.

31 BOISÉ CITY, IDAHO, *March* 5, 1891.

MR. PRESIDENT: I am instructed to inform your honorable body that the house of representatives has refused to concur in senate amendments to house bill No. 33, "An act prosecuting offenses on information and to dispense with the calling of grand juries except by order of the district judges."

Respectfully, CHAS. H. REED,
Chief Clerk.

Page 121.

Mr. Finch moved that the senate insist on its amendment and ask for a conference committee.

Which motion prevailed.

Pages 130 and 131, March 6, 1891.

Message from the House.

Office of chief clerk of the house of representatives.

BOISÉ CITY, IDAHO, *March* 6, 1891.

MR. PRESIDENT: I am instructed to inform your honorable body that the speaker has appointed Messrs. Price, Ramsey, and Steunenberg as a conference committee on the part of the house in reference to house bill No. 33, "An act to provide for prosecuting offenses on information and to dispense with the calling of grand juries except by order of the district judge."

Respectfully, CHAS. H. REED,
Chief Clerk.

Pages 173 and 174, March 11, 1891.

Message from the House.

Office of the chief clerk of the house of representatives.

BOISÉ CITY, IDAHO, *March* 11, 1891.

MR. PRESIDENT: I am instructed to inform your honorable body that the house of representatives has concurred in senate
32 amendment to house bill No. 33, "An act to provide for prosecuting offenses on information and to dispense with calling of grand juries, except by order of district judge."

Respectfully, CHAS. H. REED,
Chief Clerk.

Pages 186, March 12, 1891.

At 2.10 o'clock Mr. President announced that he was about to sign house bill No. 33 "An act to provide for prosecuting offenses on in-

formation and to dispense with the calling of grand juries except by order of the district judges."

Pages 207, March 13, 1891.

Message from the House.

Office of chief clerk of the house of representatives.

BOISÉ CITY, IDAHO, *March* 13, 1891.

Mr. PRESIDENT: I am instructed to inform your honorable body that the governor has this day approved house bill No. 33, "An act to provide for prosecuting offenses on information and to dispense with the calling of grand juries except by order of the district judges."

Respectfully, CHAS. H. REED,
Chief Clerk.

33 Executive department, office of secretary of state, Boisé City, State of Idaho.

I, M. Patrie, secretary of the State of Idaho, do hereby certify that the foregoing and annexed is a full, true, correct, and complete transcript and copy of all journal entries of both houses of the legislature of the State of Idaho relating to house bill No. 33, to wit, of all house and senate journal entries relating to the act of said legislature, entitled:

"An act to provide for prosecuting offenses on information and to dispense with the calling of grand juries except by order of the district judges."

Which passed the house of representatives March 3rd, 1891.

Which passed the senate March 4th, 1891.

Which was approved by the governor of said State March 13, 1891, and

Which was filed in the office of the secretary of said State, to wit, this office, on the 14th day of March, 1891, and then admitted to record.

In testimony whereof I have hereunto set my hand and affixed the great seal of said State.

Done at Boisé City, the capital of Idaho, this 27th day of March, 1900.

[SEAL.]

M. PATRIE,
Secretary of State,
By W. H. GIBSON,
Chief Clerk.

Endorsed: No. 181. Circuit court, ninth circuit, district of Idaho. In the matter of the application for a writ of *habeas corpus.* Petition for a writ of *habeas corpus.* Filed April 2nd, 1900. A. L. Richardson, clerk. J. W. Dorsey and J. H. Hawley; Hawley, Puckett, and Hawley, attorneys for petitioner.

34 *Rule to Show Cause.*

In the Circuit Court of the United States in and for the Ninth Circuit and District of Idaho.

In the Matter of the Application of JACK DAVIS for a Writ of *Habeas Corpus.*

Rule to show cause.

On reading the petition of Jack Davis, the applicant in the above-entitled matter, filed herein on the 2nd day of April, 1900, wherein it is alleged and shown that said Jack Davis has been deprived of his liberty and is in custody and threatened with deprivation of life without due process of law and contrary to the Constitution of the United States, wherefore, good cause appearing—

It is ordered that J. E. Burke, who as sheriff of Cassia county, State of Idaho, now holds, imprisons, and detains, as it is said, the said Jack Davis, and B. F. Howell, the county attorney of said Cassia county, and S. H. Hays, the attorney general of said State of Idaho, appear and show cause, if any they have, before the above-entitled court, at its court-room, at Boisé City, State of Idaho, on Monday, the 2nd day of April, A. D. 1900, at the hour of 2 o'clock in the p. m. of said day, or as soon thereafter as counsel can be heard, why a writ of *habeas corpus* in the above-entitled application should not issue as therein prayed and why said Jack Davis should not be released from custody and restored to liberty.

It is further ordered that until the final determination of the foregoing application all further proceedings against said Jack Davis be stayed, and that copy of this order be served upon said J. E. Burke, B. F. Howell, and S. M. Hays.

Done in open court this 2nd day of April, 1900.

JAS. H. BEATTY, *Judge.*

Endorsed: No. 181. In the circuit court of the United States in and for the ninth district and circuit of Idaho. In the matter of the application of Jack Davis for a writ of *habeas corpus.* Rule to show cause. Filed April 2nd, 1900. A. L. Richardson, clerk.

35 *Answer.*

In the Circuit Court of the United States in and for the Ninth Circuit and District of Idaho.

In the Matter of the Application of JACK DAVIS for a Writ of *Habeas Corpus.*

Answer to rule to show cause.

To the honorable circuit court of the United States, ninth circuit, in and for the Idaho central division thereof:

Comes now Samuel H. Hays, attorney general of the State of Idaho, appearing for and on behalf of B. F. Howells, county attorney of

Cassia county; J. F. Burke, sheriff of Cassia county, and in his own behalf, and with him W. E. Borah, Esq., attorney for the aforesaid parties, and, answering the rule to show cause heretofore issued herein, says:

1. That said Jack Davis was informed against, tried, convicted, sentenced, and proceeded against, as set forth in the petition herein, and is now in the custody of the said J. F. Burke, sheriff aforesaid, awaiting the order of the district court of the fourth judicial district of the State of Idaho in and for Cassia county.

2. That at the November, 1899, term of the supreme court of the State of Idaho said J. F. Burke, sheriff of Cassia county, as aforesaid, filed his petition in said court, claiming the custody of said Jack Davis pending the execution of the death penalty, and asked that a writ of *habeas corpus* be directed to the warden of the penitentiary of the State of Idaho, directing him to deliver the said Jack Davis into the custody of the said J. F. Burke, sheriff, as aforesaid; that said supreme court of the State of Idaho filed its opinion in said matter on the 22nd day of December, 1899, a copy of which said opinion is hereto attached and made a part hereof and marked "Exhibit A."

3. That the act referred to in the petition herein, entitled
36 "An act for prosecuting offenses on information and to dispense with the calling of grand juries except by order of the district judge," approved March 13th, 1891, has been ever since said time treated and accepted by the courts and the people of the State as a valid and binding law of said State.

Wherefore we ask that the said writ be by the court denied.

SAMUEL H. HAYS,
Attorney General,
W. E. BORAH,
Attorneys for J. F. Burke, Sheriff; B. F. Howells, County Attorney; Samuel H. Hays, Attorney General.

37 EXHIBIT "A."

Filed Dec. 22nd, 1899.

In the Supreme Court of the State of Idaho, November Term, 1899.

In re JACK DAVIS. Original Application for a Writ of *Habeas Corpus* by the Sheriff of Cassia County to Recover the Custody of Jack Davis. Sol. Hasbrouck, Clerk.

Writ of mandate—Custody of prisoner—Criminal law—Sentence—*Ex post facto* law—Changing place of executing judgment.

1. The provision of section 159, R. S. 1887, is intended as and is a general saving clause to penal statutes, amendatory and otherwise, and continues in force a statute as it existed as to all offenses committed prior to repeal, and a person convicted of an offense and sentenced to death prior to repeal must be punished under the law as it existed at the time of the commission of the offense.

2. Act of February 18, 1899 (Session Laws 1899, p. 340), amending certain sections of the Revised Statutes 1887, regulating the time, place, and manner of inflicting the death penalty, construed with section 159, R. S., is not applicable to past offenses, and is prospective only in its operation.

(Syllabus by the court.)

Original application to this court by sheriff of Cassia county for writ of *habeas corpus* for the purpose of obtaining the custody of one Davis, who was resting under the death sentence. Writ granted.

W. E. Borah, for petitioner.
S. H. Hays, attorney general, for Warden Hailey.
Hawley & Puckett, *amicus curiæ*.

38 SULLIVAN, *J.*:

This is an application for a writ of *habeas corpus* made by J. E. Burke, sheriff of Cassia county, to obtain the custody of one Jack Davis, who was convicted of the crime of murder and sentenced to be hung therefor. Said sentence was stayed pending an appeal to this court, which appeal was decided against said Davis, and thereafter his execution was fixed for February 1st, 1899. Thereafter, upon application for a writ of *habeas corpus* to the Federal court, execution was stayed until an appeal to the Federal court should be determined. On February 18, 1899, the legislature of Idaho passed an act providing that the execution of all persons on whom the penalty of death was imposed should be within the walls of the penitentiary; that thereafter the sheriff of said Cassia county delivered said Davis to the warden of the State penitentiary, at Boise City, Idaho.

By his petition he asks that the said Davis be restored to his custody so that the sentence of the law may be carried out, provided the appeal which is now pending in the circuit court of appeals, ninth circuit, shall be decided against said Davis.

When Davis was convicted and judgment of death passed upon him section 8021, Revised Statutes, read as follows:

"SECTION 8021. The judgment of death must be executed within the walls or yard of a jail or some convenient private place in the county. The sheriff of the county must be present at the execution, and must invite the presence of a physician, the district attorney of the county, and at least twelve reputable citizens, to be selected by him, and he shall at the request of the defendant, permit such ministers of the gospel, not exceeding two, as the defendant may name, and any persons, relatives or friends, not to exceed five, to be present at the execution, together with such peace officers as he may think expedient, to witness the execution. But no other persons than those mentioned in this section can be present at the execution,

nor can any person under age be allowed to witness the *the*
39 same."

Thereafter, on February 18, 1899, said section 8021 was amended (see Session Laws 1899, p. 342) to read as follows:

"SECTION 8021. The State prison board of the State, at the expense of the State of Idaho, shall provide a suitable room or place, closed from public view within the walls of the State penitentiary and therein erect and construct the necessary scaffolding, traps and appliances requisite for carrying into execution the death penalty; and the punishment of death must, when pronounced by sentence in this State, in each and every case, be inflicted by the warden, in the State penitentiary, in the room or place, and with the appliances aforesaid, by hanging said convict by the neck until he shall be dead."

The question involved in this case is, under which law must the judgment against Davis be carried into execution? Whether under the provisions of said section 8021 before amendment or under its provisions after amendment. So far as the provisions of said section, as amended, are concerned, the Supreme Court of the United States in the case of *In re* Medley, 134 U. S., 855, held that such a law is *ex post facto* as to crimes committed prior to its passage, since it changes the punishment in such a material degree as to come within the inhibition of the provisions of the Federal Constitution. This being a Federal question, the decision of that court must be accepted as final. Therefore the execution of said judgment cannot be performed by the warden of the State penitentiary, and the warden has no right to the custody of said Davis.

The question then arises, did the amendment of said section 8021 repeal its provisions as to the execution of the death sentence as they existed prior to the amendment, and thus leave no law under which said sentence may be executed and because thereof permit Davis to escape the judgment pronounced against him? Otherwise to pardon him by legislation.

It certainly was not the intention of the legislature by said amendatory act to make a general gaol delivery of all prisoners
40 upon whom the death sentence had been passed and not carried into execution at the date of said amendment.

Said amendatory act has attached thereto the usual repealing clause declaring that "all acts and parts of acts in conflict with this act are hereby repealed."

It is contended by Messrs. Hawley & Puckett, who appear as friends of the court, that said amendatory act, amending certain sections of the Revised Statutes, approved February 18, 1899 (see Session Laws 1899, p. 340), repeals the former provisions of said sections so amended relating to the incarceration, punishment, and execution of persons condemned to death, and for that reason under the rule laid down in *In re* Medley, *supra*, there is no law by which the judgment against Davis can be executed, while counsel for the petitioner contends that section 159, Revised Statutes 1887, is a general saving clause for all criminal statutes such as those under consideration, and that by reason thereof the amendatory act did not repeal

the old law relative to the manner, time, and place of the execution of the death penalty. Said section 159 is as follows:

"SEC. 159. The repeal of any law creating a criminal offense does not constitute a bar to the indictment and punishment of an act already committed in violation of the law so repealed, unless the intention to bar such indictment and punishment is expressly declared in the repealing act."

The evident purpose of that statute was and is to prevent the escape from punishment of those charged with or convicted of crime where a change is made by amendment of the statute then in force, either in the quality of the crime or in the punishment thereof when the amended statute is to go into effect before the completion of the punishment imposed. Said section 159 was copied from the Penal Code of California, section 329, and that section has been construed by the supreme court of that State in People *vs.* McNulty, 93 Cal., 427, as a general saving clause, and under it a person who has been convicted of an offense must be punished under the law
41 as it existed at the time of the commission of the offense, though the clause of the act prescribing the punishment has since been repealed by an amendment, which increases the punishment. In People *vs.* Vincent, 30 Pac. Rep., the court cites with approval The People *vs.* McNulty, *supra*.

Those decisions have been approved by the Supreme Court of the United States.

McNulty *v.* People, 149 U. S., 882.
Vincent *v.* People, 149 U. S., 123.
See also State *v.* Smith, 64 N. W. Rep., 1022.

Upon both reason and principle, we think the rule laid down in those cases correct when applied to the construction of the provisions of said section 159.

The amendments as made by said act do not apply to convictions for offenses committed before their enactment, and are not applicable to past offenses and are prospective only in their operation.

Under the facts of this case as supplemented by the provisions of section 8360, R. S., which is as follows:

"SEC. 8360. In cases where any party is held under illegal restraint or custody or any other person is entitled to the restraint or custody of such party, the judge or court may order such party to be committed to the restraint or custody of such person as is by law entitled thereto"—

The petitioner, as sheriff of said Cassia county, is entitled to the custody of said Davis. Under the law as it was before it was amended said sheriff was the legal custodian of said Davis until the judgment of the court has been executed, and as said law was not changed as to Davis, the sheriff remains his legal custodian and is now entitled to his custody.

It is therefore ordered that said Jack Davis be committed to the custody of the petitioner, J. E. Burke, sheriff of Cassia county, to be dealt with according to law and the authority of the court having jurisdiction in the premises.

Huston, C. J., and Quarles, J., concur.

42 Supreme Court of the State of Idaho, November Term, 1899.

In re JACK DAVIS.

I, Sol. Hasbrouck, clerk of the supreme court of the State of Idaho, do hereby certify that the preceding and annexed contains a true and correct copy of the original opinion in the above-entitled cause, on the 22nd day of December, A. D. 1899, and now on file in my office.

Witness my hand and the seal of the court this 31 day of March, 1900.

[SEAL.] SOL. HASBROUCK, *Clerk.*

Endorsed: No. 181. In U. S. circuit court, district of Idaho, central division. *In re* petition of Jack Davis for writ of *habeas corpus.* Answer to rule. Filed April 2nd, 1900. A. L. Richardson, clerk.

43 *Order.*

In the Circuit Court of the United States in and for the Ninth Circuit and District of Idaho, Central Division.

In the Matter of the Application of JACK DAVIS for a Writ of *Habeas Corpus.*

Order and judgment denying writ and remanding petitioner.

Upon reading the petition of Jack Davis, the applicant in the above-entitled matter, filed herein on the 2nd day of April, 1900, wherein it is alleged that said Jack Davis has been deprived of his liberty and — in custody and is threatened with deprivation of life without due process of law and in violation of the Constitution of the United States, and the rule to show cause thereupon issued and the return thereto, which rule to show cause is directed to J. E. Burke, who, as sheriff of Cassia county, Idaho, now holds in custody, imprisons, and detains said Jack Davis, and to B. F. Howell, as and who is the county attorney of said Cassia county, and to S. H. Hays, as and who is the attorney general of the State of Idaho:

Now, after hearing James H. Hawley, Esq., and J. W. Dorsey, Esq., as counsel for said petitioner, in support of said application for a writ of *habeas corpus* and to discharge said Jack Davis from custody and restore him to liberty, and said S. H. Hays, Esq., the attorney general of said State of Idaho, appearing therefor, and W. E. Borah, Esq., special counsel for said J. E. Burke and of said State, in opposition to said application, and all questions raised by said return and by said petition having been submitted by said counsel to the court for consideration and determination, and the court having duly considered and deliberated and being fully advised in the premises, it is hereby—

Ordered and adjudged that said application for a writ of *habeas corpus* be, and the same is hereby, denied; to which said ruling said counsel for said petitioner excepts and prays that their exception be, and the same is hereby, noted.

44 JAS. H. BEATTY, *Judge.*

Endorsed: No. 181. In the circuit court of the United States in and for the ninth circuit and district of Idaho. In the matter of the application for a writ of *habeas corpus*. Order denying writ. Filed April 2nd, 1900. A. L. Richardson, clerk.

45 *Notice.*

In the Circuit Court of the United States in and for the Ninth Circuit and District of Idaho.

In the Matter of the Application of JACK DAVIS for a Writ of *Habeas Corpus.*

To the above-entitled court and to S. H. Hays, the attorney general of the State of Idaho:

Please take notice that Jack Davis, the petitioner above named, conceiving himself aggrieved, intends to appeal from the decision, order, and judgment of said court in the above-entitled matter, whereby the application of said Jack Davis for a writ of *habeas corpus* was refused and denied, and does appeal from said decision, order, and judgment to the Supreme Court of the United States.

JAMES H. HAWLEY AND
J. W. DORSEY,
Attorneys and Counsel for said Jack Davis.

I acknowledge service hereof this second day of April, 1900.

S. H. HAYS,
Attorney General of Idaho, and
W. E. BORAH,
Attorneys for J. E. Burke, Sheriff.

Endorsed: No. 181. In the circuit court of the United States in and for the ninth circuit and district of Idaho. Notice of intention to appeal. In the matter of the application of Jack Davis for a writ of *habeas corpus*. Filed April 2nd, 1900. A. L. Richardson, clerk.

46 *Petition.*

In the Circuit Court of the United States in and for the Ninth Circuit and District of the State of Idaho.

In the Matter of the Application of JACK DAVIS for a Writ of *Habeas Corpus.*

Petition for Appeal.

Petition of Jack Davis, the applicant, for a writ of *habeas corpus*, above named, for an order allowing an appeal from the decision, order, and judgment entered in the matter of said application to the Supreme Court of the United States.

Jack Davis, the petitioner and applicant herein, feeling himself aggrieved by the decision, order, and judgment heretofore made and

entered in the matter of said application the 2nd day of April, 1900, whereby it was ordered and adjudged that said application be denied, comes now, by James H. Hawley, Esq., and J. W. Dorsey, Esq., his attorneys and counsel, and petition- this court for an order allowing him to prosecute an appeal from said decision, order, and judgment to the Supreme Court of the United States under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of bond or security which said petitioner shall give and furnish upon said appeal, and that upon the giving of such security all further proceedings against said Jack Davis be suspended and stayed until the hearing and determination of said appeal, and also that a transcript and record of the proceedings and papers upon which said decision, order, and judgment was made, duly authenticated, may be sent to the Supreme Court of the United States. This application is made on the records and files herein and upon the assignments of error herein and herewith filed.

J. W. DORSEY AND
J. H. HAWLEY,
Attorney- for said Petitioner.

Approved and allowed as prayed for.

JAS. H. BEATTY, *Judge.*

47 Endorsed: No. 181. In the circuit court of the United States in and for the ninth circuit and district of Idaho. In the matter of the application of Jack Davis for a writ of *habeas corpus*. Petition for appeal. Filed April 2nd, 1900. A. L. Richardson, clerk.

48 *Assignments of Error.*

In the Circuit Court of the United States in and for the Ninth Circuit and District of Idaho.

In the Matter of the Application of JACK DAVIS for a Writ of *Habeas Corpus.*

Assignments of error.

Now comes Jack Davis, the petitioner above named and appellant herein, by James H. Hawley, Esq., and J. W. Dorsey, Esq., his attorneys, and says that in the record and proceedings herein there is manifest error, in this, to wit:

1st. That there is not and never has been any indictment or presentment of the grand jury against your said petitioner with murder, but he has been charged, held to answer, imprisoned, tried for and convicted of murder and sentenced to be hanged, and is now threatened with death under and by virtue of an information filed in the district court of Cassia county, State of Idaho, on the 5th day of April, 1897, by the district attorney of the fourth judicial district of the State of Idaho, and not otherwise.

(*a.*) That the only authority for so holding, trying, convicting sentencing, imprisoning, and threatening said prisoner which exists lies in section 8 of article 1 of the constitution of said State of Idaho and in a pretended act of the legislature of said State, entitled "An act to provide for prosecuting offenses on information and to dispense with the calling of grand juries except by order of the district judges," approved March 13th, 1897, and herein, 1st, said section of the constitution of the said State is not self-enacting, but required and requires supplementary legislation by the legislature of said State before it could become operative.

2nd. The said pretended act of said legislature, which is called the information act of March 13th, 1891, was and is invalid and void because it was not passed in accordance with the provisions and requirements of the constitution of said State relating to the passage of bills, to wit, section 15 of article 3 of said constitution.

49 (*b.*) That when said petitioner was so held, imprisoned, tried, convicted, and sentenced, or any thereof, there was no law of said State authorizing or permitting prosecutions by information for murder or in any capital case or for any felony whatever.

(*c.*) That in so holding, imprisoning, trying, convicting, and sentencing said petitioner and in each of said acts said district court was without jurisdiction, and all and every of said acts was and is illegal and void.

(*d.*) That said petitioner has been and is being restrained of his liberty and threatened with deprivation of life without due process of law and in violation of the fourteenth amendment of the Constitution of the United States.

(*e.*) That said circuit court erred in holding and deciding that said section 8 of article 1 of the constitution of said State and said information act of March 13th, 1891, or either thereof constituted or constitutes a sufficient authority or any authority for so holding, imprisoning, trying, convicting, sentencing, and threatening said petitioner and for restraining him of his liberty and threatening him with deprivation of life or for any act or proceeding against him in the premises or at all, and herein said circuit court erred in not holding and *holding* that said section of said State constitution is not self-executing, but is dormant until given vitality and force by supplementary and appropriate State legislation, and erred in not holding and deciding that said information act was and is invalid and void because it was not passed in accordance and compliance with the requirements of section 15 of article 3 of the constitution of said State and in not holding and deciding that the constitution of said State alone confers no authority, and the legislature of said State has never provided any procedure, machinery, rules, or method for prosecuting in murder cases or for prosecuting said petitioner or depriving him of his liberty or in anywise proceeding against him by information.

(*f.*) That said circuit court erred in upholding the validity of the authority exercised by said State court and by the said district attorney and by the sheriff of said Cassia county, whereby 50 said petitioner has been and is being restrained of his liberty

and threatened with death by hanging, and in not deciding that said authority and the exercise thereof was and is repugnant to the fourteenth amendment to the Constitution of the United States.

(*g.*) That said circuit court erred in holding and deciding that said petitioner has been duly or legally held, imprisoned, tried, convicted or sentenced, and in holding and deciding that said petitioner has been and is being restrained of his liberty and threatened with death by hanging by and in accordance with the constitution of the State of Idaho and the Constitution of the United States and by due process of law, and in not holding and deciding that said district court in each and every of said steps and proceedings against said petitioner was, is, and must remain wholly without jurisdiction; that said district court has and its officers have acted in contravention of the fourteenth amendment of said Federal Constitution, in that said petitioner has been and is being by said court and said officers denied the equal protection of law and deprived of his liberty and has been sentenced to death and is about to be executed without due process of law.

(*h.*) That said circuit court erred in refusing to grant said petitioner's application for a writ of *habeas corpus* and in not discharging said petitioner from custody and restoring him to liberty.

2nd. Your petitioner says that in the records and proceedings herein there is further manifest error, to wit:

That all of the laws of the State of Idaho providing for or applicable to the punishment of persons convicted of murder and of all persons or criminals convicted or capital offenses or any felony were repealed and rendered void subsequent to the offense imputed to said petitioner and charged against him by said so-called information by an act of the legislature of said State which was passed, approved, and became the law of said State relating to and providing for the punishment and execution of persons convicted and sentenced
51 to imprisonment in the State prison or to suffer death penalty on the 23rd day of February, 1899.

That said act and law of February 23rd, 1899, imposes different and additional penalties and punishments from those provided by the laws of said State in force when the crime charged against said petitioner is alleged to have been committed, deprives said petitioner of rights that he had at said time, and charges the manner and character of punishment then in force to his prejudice.

(*a.*) That said circuit court erred in not holding and deciding that said act and law of February 23rd, 1899, is, as to said petitioner, inoperative, because it is *ex post facto*, and therefore contrary to sections 9 and 10 of article 1 of the Constitution of the United States, as well as section 16 of article 1 of the constitution of the State of Idaho.

(*b.*) That said circuit court erred in not holding and deciding that the laws of said State relating to the punishment of condemned criminals, as aforesaid, have been repealed since the commission of the offense with which said petitioner is charged, no longer exist, and cannot be made operative as to said petitioner for any purpose whatever.

(*c.*) That said circuit court erred in holding that section 159 of the

Revised Statutes of Idaho constitutes and is a general saving clause, the effect of which is to keep alive, as to said petitioner, the laws of said State relating to the punishment of condemned criminals, as aforesaid, which were in force when the homicide imputed to petitioner was committed and which were repealed by said act of February 23, 1899, and in holding that said punishment laws are still in force as to said petitioner, and that he may be restrained of his liberty, deprived of his life, or at all punished thereunder.

(*d.*) That said circuit court erred in not holding that said petitioner cannot be punished under said act of February 23rd, 1899, because it is *ex post facto* as to him, nor under the laws which said act repeals, because there is no saving clause in either said act or in the general laws of the State, and said repealed laws therefore are void.

52 (*e.*) That said circuit court erred in not holding that there is no law of the State of Idaho under which said petitioner can be punished.

(*f.*) That said circuit court erred in not holding that by the passage and enactment of said act of February 23rd, 1899, the said district court lost all jurisdiction to sentence, punish, or further restrain said petitioner of his liberty, and that because of said act said petitioner has been and is deprived of his liberty without due process of law and in violation of the fourteenth amendment of the Constitution of the United States.

(*g.*) That said circuit court erred in refusing to grant the application of petitioner for a writ of *habeas corpus* and in not discharging said petitioner from custody and in not restoring him to liberty.

Now, whereas by the law of the land the said writ of *habeas corpus* should have been issued and granted and said petitioner should have been released and discharged from the custody of the sheriff of said Cassia county, Idaho, and said trial, conviction, and sentence cancelled and set at naught and held to be null and void—

The said petition- and applicant for said writ of *habeas corpus* prays that the order and judgment of said circuit court may be reversed, annulled, and altogether held for nothing; that said petitioner be restored to his liberty, and that he may have such other relief as he may be entitled to.

All of which is respectfully submitted.

J. W. DORSEY AND
J. H. HAWLEY,
Attorneys for Petitioner and Appellant.

Endorsed: No. 181. In the circuit court of the United States in and for the ninth circuit and district of Idaho. In the matter of the application of Jack Davis for a writ of *habeas corpus*. Assignments of error. Filed April 2nd, 1900. A. L. Richardson, clerk.

53 *Order Allowing Appeal.*

In the Circuit Court of the United States in and for the Ninth District and Circuit of Idaho.

In the Matter of the Application of JACK DAVIS for a Writ of *Habeas Corpus.*

Order allowing an appeal.

On reading and filing the petition of Jack Davis, the applicant above named, for an order allowing an appeal, and considering the assignment of error made and filed with the clerk of said court with said petition by the said petitioner, and on motion of James H. Hawley, Esq., and J. W. Dorsey, Esq., the attorney and counsel for said petitioner—

It is hereby ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the decision, order, and judgment made and entered herein on the 2nd day of April, 1900, whereby the application of said Jack Davis for a writ of *habeas corpus* was refused and denied.

It is further ordered that a complete transcript of the record herein and of all proceedings and papers upon which said decision, order, and judgment was made, duly authenticated, be forthwith transmitted to the Supreme Court of the United States.

It is further ordered, notice of intention to appeal to said court having been duly given and said appeal having been made and filed herein, that the amount of bond and security to be furnished by said applicant and petitioner be, and the same is hereby, fixed at the sum of three hundred ($300.00) dollars.

JAS. H. BEATTY, *Judge.*

54 Endorsed: No. 181. In the circuit court of the United States in and for the ninth circuit and district of Idaho. In the matter of the application of Jack Davis for a writ of *habeas corpus.* Order allowing appeal. Filed April 2nd, 1900. A. L. Richardson, clerk.

55 *Order Staying Execution.*

In the Circuit Court of the United States in and for the Ninth District and Circuit of Idaho.

In the Matter of the Application of JACK DAVIS for a Writ of *Habeas Corpus.*

Order staying execution.

To J. E. Burke, sheriff of Cassia county, State of Idaho:

You and all persons acting as your deputies, agents, servants, and employees are hereby notified that Jack Davis, now in your custody, has petitioned for, been allowed, and has perfected an appeal to the

Supreme Court of the United States from a decision, order, and judgment made and entered by said circuit court in the matter of said application for a writ of *habeas corpus* on the 2nd day of April, 1900, whereby said application was refused and denied, and that said Jack Davis has filed the necessary bond and security, and the same has been duly approved; and you are further notified that such appeal stays the execution and all further proceedings affecting said Jack Davis until said Supreme Court of the United States has fully passed upon and determined the same.

You and all person- assuming or having authority over said Jack Davis are therefore advised, requested, admonished, directed, and ordered that said Jack Davis be held in the custody of said sheriff of said county pending said appeal and until final action and judgment by the Supreme Court of the United States has been taken and entered in the matter of said appeal, and in the meantime you stay your hand as court and officers thereof and of said Cassia county and take no steps or further proceedings against said Jack Davis.

JAS. H. BEATTY,
United States District Judge.

Endorsed: No. 181. In the circuit court of the United States in and for the ninth district and circuit of Idaho. Order staying execution Filed April 3rd, 1900. A. L. Richardson, clerk.

56 *Journal Entries.*

At a stated term of the circuit court of the United States for the district of Idaho, held at Boisé, Idaho, April term, 1900.

Present: Hon. Jas. H. Beatty, judge.

In the Matter of the Application of JACK DAVIS for a Writ of *Habeas Corpus.* No 181.

MONDAY, *April 2nd*, 1900.

On this day in open court Jack Davis, by his attorneys, James H. Hawley, Esqr., and J. W. Dorsey, Esqr., presented his petition, duly verified, praying for the issuance of a writ of *habeas corpus* directed to J. E. Burke as sheriff of Cassia county, State of Idaho. Whereupon S. H. Hays, Esqr., attorney general of the State of Idaho, and W. E. Borah, Esqr., attorney for said J. E. Burke, appeared in this behalf and in opposition to the issuance of said writ, and it was agreed in open court by the counsel for the respective parties that the actual presence of said Jack Davis should be waived and that the subsequent proceedings herein should be had in his absence.

Whereupon the court refused the request of said Jack Davis for the issuance of said writ and granted a rule requiring the said J. E. Burke to show cause at 2 o'clock p. m. of this day why said writ should not issue.

The hour having arrived at which said J. E. Burke was to show cause why the writ of *habeas corpus* should not issue herein, the said J. E. Burke, by his attorney, W. E. Borah, Esqr., and the State of

Idaho appearing by said S. H. Hays, attorney general, made answer and return to said rule to show cause, and thereupon and after argument by the respective counsel, and being fully advised in the premises, the court made its order and judgment, in writing, denying the writ of *habeas corpus* prayed for and remanded the petitioner; to which said order counsel for petitioner excepted; which exception was allowed.

57 Thereupon the said Jack Davis, by his said attorneys, presented and filed his notice of appeal, in writing, appealing from said decision, order, and judgment of the court herein to the Supreme Court of the United States; whereupon and in open court the said Jack Davis, by his said counsel, presented his petition, in writing, praying for an order of the court allowing an appeal to the Supreme Court of the United States from the said order and judgment of the court denying the writ of *habeas corpus*, and filed by permission of the court with the clerk his assignment of errors therein and thereon, and, the said counsel for said J. E. Burke and the State of Idaho being present and not objecting thereto, the court made an order allowing an appeal herein and fixing the amount of bond and security to be furnished by said appellant, Jack Davis, on said appeal in the sum of three hundred dollars.

Thereupon the court, at the request of counsel for said Jack Davis, made in open court, the counsel for said J. E. Burke and the State of Idaho not objecting thereto, made and signed its order, in writing, directing said Jack Davis to be held in the custody of the said J. E. Burke, as sheriff of said Cassia county, pending the appeal herein, and staying further proceedings affecting said Jack Davis until final action and judgment of the Supreme Court of the United States has been taken and entered in the matter of said appeal.

TUESDAY, *April 3rd*, 1900.

In the Matter of the Application of JACK DAVIS for a Writ of *Habeas Corpus*. No. 181.

On this day the bond of Jack Davis in the sum of three hundred dollars upon appeal to the Supreme Court of the United States was approved, and thereupon citation on appeal was issued herein.

58 *Bond.*

In the Circuit Court of the United States in and for the Ninth Circuit and District of Idaho.

In the Matter of the Application of JACK DAVIS for a Writ of *Habeas Corpus*.

Bond on appeal.

Know all men by these presents that we, Jack Davis, as principal, and Geo. Spiegel and F. W. Galbraith, both of Boisé City, Ada county, State of Idaho, as sureties, are jointly and severally held and firmly bound unto J. E. Burke, the sheriff of Cassia county,

State of Idaho, in the sum of three hundred ($300) dollars, lawful money of the United States of America, to be paid to the said J. E. Burke, the said sheriff; for the payment of which, well and truly to be made, we bind ourselves and each of us and our and each of our heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 2nd day of April, 1900.

The condition of the above obligation is such that the said Jack Davis has taken an appeal to the Supreme Court of the United States to reverse the decision, order, and judgment rendered and entered by the circuit court of the United States, ninth judicial district, in and for the district of Idaho, in the above-entitled proceeding on the 2nd day of April, 1900, whereby the application of the said Jack Davis for a writ of *habeas corpus* was refused and denied.

Now, therefore, the condition of this obligation is such that if the said above-named Jack Davis shall prosecute said appeal to effect and answer all costs and damages if he fail to sustain his appeal, then this obligation shall be void; otherwise to be and remain in full force and effect.

JACK DAVIS. [SEAL.]
GEO. SPIEGEL. [SEAL.]
F. W. GALBRAITH. [SEAL.]

59 STATE OF IDAHO, } ss:
County of Ada, }

Geo. Spiegel and F. W. Galbraith, the sureties to the foregoing bond, being severally sworn, each for himself deposes and says that he is a resident and freeholder in Ada county, State of Idaho, and is worth the amount stated in the foregoing bond as the penalty thereof over and above all his just debts and liabilities, exclusive of property exempt from execution.

GEO. SPIEGEL.
F. W. GALBRAITH.

Subscribed and sworn to before me this 3rd day of April, 1900.

[SEAL.] SHERMAN G. KING,
Notary Public.

(Stamp.)
(Stamp.)

Approved:
JAS. H. BEATTY, *Judge.*

Endorsed: No. 181. In the circuit court, ninth circuit, district of Idaho, central division. In the matter of the application of Jack Davis for a writ of *habeas corpus*. Bond on appeal. Dated April 2nd, 1900. Filed April 3rd, 1900. A. L. Richardson, clerk.

60 In the Circuit Court of the United States in and for the Ninth District and Circuit of Idaho.

In the Matter of the Application of JACK DAVIS for a Writ of *Habeas Corpus.*

Citation on Appeal.

THE UNITED STATES OF AMERICA, *ss:*

To J. E. Burke, sheriff of Cassia county, State of Idaho, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, in the District of Columbia, on the first day of June, 1900, pursuant to an appeal, duly allowed, filed in the clerk's office of the circuit court of the United States, ninth circuit, district of Idaho, central division, from the decision, order, and judgement of said court made and entered on the 2nd day of April, 1900, whereby the application of Jack Davis for a writ of *habeas corpus* was denied and said Jack Davis remanded to the custody of said J. E. Burke, as such sheriff, in which appeal Jack Davis is appellant and said J. E. Burke is respondent, to show cause, if any there be, why the order and judgement rendered against appellant in said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in this behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, this 3d day of April, in the year of our Lord one thousand nine hundred.

JAS. H. BEATTY,
United States District Judge, Sitting as the Judge of said Circuit Court.

Due service of the foregoing citation admitted this 3 day of April, 1900.

S. H. HAYS,
Attorney General of the State of Idaho.
W. E. BORAH,
Att'y for the Sheriff of Cassia County, State of Idaho.

60½ [Endorsed:] No. 181. In the circuit court of the United States in and for the ninth district and circuit of Idaho. In the matter of the application of Jack Davis for writ of *habeas corpus.* Citation on appeal. Filed April 4th, 1900. A. L. Richardson, clerk.

61 *Clerk's Certificate.*

In the United States Circuit Court, Ninth Judicial Circuit and District of Idaho.

In the Matter of the Application of JACK DAVIS for a Writ of *Habeas Corpus.*

I, A. L. Richardson, clerk of the circuit court of the United States in and for the district of Idaho, do hereby certify that the foregoing transcript of pages, numbered from 1 to 61, inclusive, contains full, true, and correct copies of the pleadings and proceedings in the above-entitled cause, and that the same together constitute the transcript of the record herein upon appeal to the Supreme Court of the United States.

Witness my hand and the seal of said circuit court, affixed at Boisé, Idaho, this 7th day of April, 1900.

[Seal United States Circuit Court, Idaho.]

A. L. RICHARDSON, *Clerk.*

[10 cent U. S. internal-revenue stamp, canceled April 7th, 1900. A. L. R.]

Endorsed on cover: File No., 17,768. Idaho C. C. U. S. Term No., 286. Jack Davis, appellant, *vs.* J. E. Burke, sheriff of Cassia county, State of Idaho. Filed May 18th, 1900.

No. 286.
Brf. of Wilson for Appellant.
Filed Nov. 13, 1900.

FILED
NOV 13 1900
JAMES H. McKENNEY.

ARGUMENT AND BRIEF FOR APPELLANT.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 286.

JACK DAVIS, APPELLANT,

vs.

J. E. BURKE, SHERIFF OF CASSIA COUNTY, STATE OF IDAHO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO.

(17,768.)

ARGUMENT AND BRIEF FOR APPELLANT.

SUPREME COURT OF THE UNITED STATES.

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No. 286.

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vs.

J. E. BURKE, SHERIFF OF CASSIA COUNTY, STATE OF IDAHO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO.

(17,768.)

IN THE SUPREME COURT OF THE UNITED STATES.

JACK DAVIS, APPELLANT,

vs.

J. E. BURKE, SHERIFF OF CASSIA COUNTY, IDAHO, APPELLEE.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

The situation is anomolous. The facts developed in the record here and the case of appellant reported in *State vs. Davis*, 53 Pac. R., 678, indicate as complicated a tangle of facts and theories as can be found in the history of Western Jurisprudence.

The appellant contends that he has been selected as a vicarious sacrifice to appease the hatred the sheepmen of Idaho bear for the men of cattle.

Cassia county, Idaho, is a stock country. Its dominant industry is raising sheep, though large and valuable cattle ranges extend well into its southern borders. The cattle men claimed that the sheep men were trespassing upon their ranges. Frequent disputes and intense feeling existed between the two classes and passages at arms had resulted on more than one occasion

Such were the conditions when on the 17th or 18th of February 1896, the bodies of John C. Wilson and Daniel Cummings were found on a cattle range. The state of the bodies and surroundings indicated that the men had been dead about two weeks, and that homicide had been committed. The appellant was a cattle man who had had frequent alternations with sheep men over (what he claimed was) their trespasses upon his range. It was ascertained that he had been within about sixteen miles of the scene of the killing about the time it was believed the homicide had been committed. He was arrested. An information charging him with the murder of John C. Wilson was filed on April 5th, 1897. On April 7th,

1897, the trial of the case was commenced, and on April 15th, 1897, the jury empaneled, upon purely circumstantial evidence, found him guilty of murder in the first degree; whereupon the appellant, on April 24th, 1897, was sentenced to be hanged on June 4th, 1897. His motion for a new trial was denied, and on May 6th, 1898, the judgment of the lower court was affirmed by the Supreme Court of the State. On September 12th, 1898 (at the next session of the District Court,) the appellant was resentenced to be hanged on October 28th, 1898. On July 25th, 1898, the appellant filed his application for pardon with the Board of Pardons of Idaho, and on the 19th, of that month, the board continued the hearing until December 1st, 1898, and requested the Governor to reprieve appellant until December 16th, 1898. On October 20th, 1898, the Governor reprieved appellant until December 16th, 1898. On the 5th of December, 1898, the board continued the matter until the next regular meeting of the board, and granted appellant a reprieve until February 1st, 1899. On January 23rd, 1899, the Board of Pardons finally denied the application. The appellant thereupon petitioned the United States District Judge of Idaho, at Chambers, for a writ of habeas corpus, upon the ground that petitioner was being deprived of his liberty and threatened with deprivation of life without due process of law, and contrary to the Fourteenth Amendment of the Constitution of the United States, and from an order denying the writ prayed for, made January 30th, 1899, took an appeal to the United States Circuit Court of Appeals for the Ninth Circuit. The District Judge made an order staying execution pending the appeal. On October 16th, 1899, the United States Circuit Court of Appeals dismissed the appeal on the ground that inasmuch as the question raised by the appeal involved a construction of the federal constitution, that court was without jurisdiction in the premises. (See Davis v. Burke, 97 Fed. Rep. 501).

Appellant was about to be again sentenced to death by the Judge of the State court wherein he was tried and convicted, when, with the consent of the Attorney General of Idaho and by permission of the Circuit Court, he filed in that Court the petition for a writ of habeas corpus set forth in the transcript.

ASSIGNMENTS OF ERRORS.

The appellant will rely upon, and hereby specifies, the following particulars, as showing wherein the lower Court erred, to-wit:

1. That there is not and never has been any indictment or presentment to a Grand Jury against your said petitioner charging him with murder, but he has been charged, held to answer, imprisioned, tried for and convicted of murder and sentenced to be hanged and is now threatened with death, under and by virtue of an *information* filed in the District Court of Cassia County, State of Idaho, on the 5th day of April, 1897 by the District Attorney of the Fourth Judical District of this State of Idaho, and not otherwise.

(a). That the only authority for so holding, trying, convicting, sentencing, imprisoning and threating said prisoner which exists, lies in Section 8 of Article I of the Constitution of said State of Idaho and in a pretended act of the legislature of said State entitled, "An Act to Provide for Prosecuting Offenses on Information, and to Dispense with the Calling of Grand Juries, except by order of the District Judge": Approved March 13th, 1891; and herein, 1st., said Section of the Constitution of the said State is not self executing but required and requires supplementary legislation by the legislature of said State before it could or can become operative; and 2nd, the said pretended act of said legislature which is called the Information Act of March 13th, 1891, was and is invalid and void because it was not passed in accordance with the provisions and requirements of the Constitution of said state relating to the passage of bills, to-wit: Section 15 of Article 111 of said Constitution.

(b). That when said petitioner was so held, imprisoned, tried, convicted and sentenced, or any thereof, there was no law of said State authorizing or permitting prosecutions by information for murder, or in any capital case or for any felony whatever.

(c). That in so holding, imprisoning, trying, convicting and sentencing said petitioner, and in each of said acts, said District Court was without jurisdiction, and all and every of said acts was and is illegal and void.

(d). That said petitioner has been and is being restrained of his liberty and threatened with deprivation of life without due process of law, and in violation of the Fourteenth Amendment of the Constitution of the United States.

(e). That said Circut Court erred in holding and deciding that said Section 8 of Article I of the Constitution of said State, and said Information Act of March 13th, 1891, or either thereof, constituted or constitutes a sufficient authority or any authority for so holding, imprisoning, trying, convicting, sentencing and threatening said petitioner, and for restraining him of his liberty and threatening him with deprivation of life, or for any act or proceeding against him in the premises, or at all; and herein said Circut Court erred in not holding that said section of said State Constitution is not self-executing, but is dormant until given vitality and force by supplementary and appropriate state legislature; and erred in not holding and deciding that said Information Act was and is invalid and void because it was not passed in accordance and in compliance with the requirements of Section 15 of Article III of the Constitution of said State, and in not holding and deciding that the Constitution of said State alone confers no authority, and that the legislature of said state has never provided any procedure, machinery; rules or method, for prosecuting in murder cases or for prosecuting said petitioner, or depriving him of his liberty, or in any wise proceeding against him by information.

(f). That said Circuit Court erred in upholding the validity of the authority exercised by said State Court and by the said District Attorney and by the Sheriff of said Cassia County, whereby said petitioner has been and is being restrained of his liberty, and threatened with death by hanging, and in not deciding that said authority and the exercise thereof was and is repugnant to the Fourteenth Amendment to the Constitution of the United States.

(g). That said Circuit Court erred in holding and deciding that said petitioner had been duly and legally held, imprisoned, tried, convicted and sentenced, and in holding and deciding that said petitioner has been and is being restrained of his liberty and threatened with death by hanging by and in accordance with the Con-

stitution of the State of Idaho and the Constitution of the United States, and by due process or law; and in not holding and deciding that said District Court in each and every of said steps and proceedings against said petitioner was, is, and must remain wholly without jurisdiction; that said District Court has and its officers have acted in contravention of the Fourteenth Amendment of said Federal Constitution, in that said petitioner has been and is being by said Court and said officers, denied the equal protection of law and deprived of his liberty and has been sentenced to death and is about to be executed, without due process of law.

(h). That said Circuit Court erred in refusing to grant said petitioner's application for a writ of habeas corpus, and in not discharging said petitioner from custody and restoring him to liberty.

2. Your petitioner says that in the records and proceedings herein there is further manifest error, to-wit:

That all of the laws of the State of Idaho providing for or applicable to the punishment of persons convicted for murder, and of all persons or criminals convicted of capital offenses or of any felony, where repealed and rendered void subsequent to the offense imputed to said petitioner and charged against him by said so-called information, by an act of the legislature of said State, which was passed, approved and became the law of said State relating to or providing for the punishment or execution of persons convicted and sentenced to imprisonment in the State prison, or to suffer the death penalty, on the 23d of February 1899.

That said act and law of February 23rd, 1899, imposed different and additional penalties and punishments from those provided by the laws of said State in force when the crime charged against said petitioner is alleged to have been committed; deprives said petitioner of rights that he had at said time and changes the manner and character of punishment then in force, to his prejudice.

(a). That said Circuit Court erred in not holding and deciding that said act and law of February 23rd, 1899 is, as to said petitioner, inoperative, because it is *ex post facto* and therefore contrary to Sections 9 and 10 of Article I of the Constitution of the

United States as well as Section 16 of Article I of the Constitution of the State of Idaho.

(b). That said Circuit Court erred in not holding and deciding that the laws of said State relating to the punishment of condemned criminals, as aforesaid, have been repealed since the commission of the offense with which said petitioner is charged; no longer exist and cannot be made operative, as to said petitioner, for any purpose whatever.

(c). That said Circuit Court erred in holding that Section 159 of the Revised Statutes of Idaho constitute and is a general saving clause, the effect of which is to keep alive, as to said petitioner, the laws of said State relating to the punishment of condemned criminals as aforesaid, which were in force when the homicide imputed to petititioner was committed, and which were repealed by said act of February 23d, 1899, and in holding that said punishment laws are still in force as to said petitioner and that he may be restrained of his liberty, deprived of his life, or at all punished thereunder.

(d) That said Circuit Court erred in not holding that said petitioner cannot be punished under said act of February 23, 1899, because it is *ex post facto* as to him, nor under the laws which said act repeal because there is no saving clause either in said act, or in the general laws of the State, and said repealed laws therefore are void.

(e). That said Circuit Court erred in not holding that there is no law in the State of Idaho under which said petitioner can be punished.

(f). That said Circuit Court erred in not holding that by the passage and enactment of said act of February 23d, 1899, the said District Court lost all jurisdiction to sentence, punish, or further restrain said petitioner of his liberty, and that, because of said act, said petitioner has been and is deprived of his liberty without due process of law and in violation of the Fourteenth Amendment of the Constitution of the United States.

(g). That said Circuit Court erred in refusing to grant the application of petitioner for a writ of habeas corpus and in dismissing

said writ and in not discharging said petitioner from custody and in not restoring him to liberty.

POINT ONE.

The appellant above named was held to answer, tried, convicted of murder, and sentenced to be hanged, under and by virtue of an information filed in the District Court of Cassia County, Idaho, by the District Attorney of the Fourth Judicial District of that State, and herein the appellant contends:

First: That Section 8 of Article 1 of the Constitution of Idaho is not self-executing, but required legislative action before it could become operative.

Second: That the Information Act of March 13th, 1891, was and is invalid and void, because not passed in accordance with the requirements of the Idaho Constitution.

Third: That, there being no law for prosecutions for information in capital cases, the District Court was without jurisdiction, and therefore,

Fourth: That the trial, conviction and sentence were illegal, null and void; contrary to the fourteenth amendment of the Constitution of the United States, and derogatory to the common law of the land.

Fifth: That the Federal Court is the proper forum, and habeas corpus the appropriate remedy, wherein and whereby to obtain relief.

As we understand the law, the validity and sufficiency of the foregoing assignment of errors upon the point first to be considered, practically depend upon the solution of one question: Was there any law of the State of Idaho authorizing precautions for felony by "information," in other words, the pith and purpose of every assignment under this point is, did the state court have jurisdiction in the premises.

ARGUMENT.

First: Section 8 of Article I of the Constitution of Idaho is not self-executing, but requires legislative action before it can become operative.

The first inquiry is whether the constitutional provision relating to prosecutions by information can be made effectual without supplemental legislation. Sec. 8 of Art. I of the Constitution of Idaho, so far as applicable provides:

"No person shall be held to answer for any felony or criminal offense of any grade, unless on presentment or indictment of a grand jury or on information of the public prosecutor, after a commitment by a magistrate."

We assume that here, as elsewhere, the attorneys for appellee will assert that this provision of the constitution is self-executing, and rely upon the illustration used by Mr. Cooley (Constitutional Limitations, p. 100) as to the fifteenth amendment to the Federal Constitution. But neither that illustration nor the principle upon which it is based, is in point here. It may be admitted that many negative and prohibitive provisions in constitutions are, *proprio vigore*, self-executing. This is so because prohibitory legislation to enforce what the Constitution in terms forbids would be no more binding or forcible than the Constitution itself, and therefore the constitutional inhibition requires no legislative aid to effectuate its purpose.

For example, *to the extent* that the Fifteenth Amendment of the National Constitution prohibits any denial or abridgement of the right to vote "on account of race, color or previous condition of servitude," it is self-executing. Of its own force it prevents the states, or the United States, from giving preference to one citizen over another, on account of race, color or previous condition of servitude. But manifestly it does not confer the right of suffrage upon anyone (*U. S. v. Reese* 92 U. S. 214, 217). It is clear that appropriate legislation is absolutely necessary before the right to vote can be affirmatively exercised by anyone. Thus, a constitution may clearly require county and town government; but, if it fails to indicate its range. and to provide proper machinery, it is not in this particular self-executing, and legislation is essential. However imperative the consitutional command that the legislature shall establish a system of town and county government, it is not self-executing and must lie dormant until given

force and operation by statute. (*Ex parte Wall*, 48 Cal., 279, 318.)

Applying the principles relied upon to Section 8, Art. I of the Idaho Constitution, it may be admitted that insofar as that section interdicts the holding to answer of any person for a criminal offense unless on indictment or information as therein prescribed, it is mandatory and prohibitive, and to *that extent* self executing. But that does not reach the question, nor dispose of the contention here. The question is: Is it self-executing to the extent that *ex proprio vigore* —without supplemental legislation—a person may be prosecuted by *information?* Upon reason and authoritity it seems to us that there can can be but one answer to this question: As to prosecutions by *information* it is *not* self executing. It furnishes no means nor method for prosecutions of this character;—it supplies no rules, and points to no procedure established by our jurisprudence either for its own enforcement or for the protection of the rights of the accused.

It is indisputable that somewhere must be found fixed rules for carrying this provision of the Idaho Constitution into effect or there can be no uniformity of procedure. Mr. Justice Cooley (Cons. Lims. 356) says: "*Due process* of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs," therefor *due process of law* is impossible unless "secured by laws operating on all alike and not subjecting the individual to the aribtrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice,"—and it is equally certain that there are but two sources whence the requisite machinery for depriving any person of life or liberty can be derived. It must be found either in the Statutes of the State, or in the common law of England.

To restrain any person of his liberty or deprive him of his property save by a prosecution or suit instituted and conducted according to the *prescribed* forms and solemnities for ascertaining guilt, or for determining the title to property,—is contrary to the

fundamental doctrines of the American people, and specifically in violation of the Fourteenth Amendment to the Constitution of the United States.

The Fourteenth Amendment prohibits a State from denying to any person within its jurisdiction the *equal* protection of the laws, or from depriving any person of life, liberty or property without DUE PROCESS OF LAW.

"The object of this limitation upon the powers of the states is to secure to everyone within their jurisdiction, irrespective of color or previous condition, the *equal* protection of the laws, and that everyonce should be judged and have his rights determined by the same rules which are applied to settle the rights of the community." *(Rowan v State*, 30 Wis., 129; S. C. 11 a. m. Rep. 565).

Unless a prosecution or trial is in accordance with *prescribed* forms, and *general* rules for the protection of individual rights or conforms to those *settled* usuages and modes of proceeding, required either by the statutory provisions of the State, or authorized by the common law of England before the immigration of our ancestors,—it is without due process of law, and therefore in disregard of the prohibitions of the Amendment of the Federal Constitution referred to.

As an information for a capital offense was, *prior to the adoption of our National Constitution, unknown to the common law*, (*4 Bl. Com., 309, 310; Hurtado v. California, 110 U. S., 545-6; Exparte Wilson*, 114 *U. S.* 423; *Wharton's Crim. Pr. & Pl. p.* 456; *State v. Boswell*, 104 Ind., 456)—it is clear that no form of pleading, nor law, nor rule as to when, how or where it shall be presented, —that no "settled usage" can be found there.

In these incidents the Constitution of Idaho does not execute tself, and therefore necessarily, it must be vitalized by statutory legislation before it can become operative.

In *State v. Ah Jim*, 9 Mont., 167, the Court on page 172 says:

"It is evident that the clause of the Constitution respecting the informatin does not execute itself. All the details affecting the exercise, jurisdiction, and limitations of the procedure, and the

rights and pleadings of the State and accused, must be defined by the legislative department. It has been observed that the States which have abolished the Grand Jury system have enacted laws to carry into effect this provision of the Constitution, and the following authorities will show their importance: *Rowan v. State*, 30 Wis., 129; *State v. Sloan*, 56 Wis., 647; *Kalloch v. Superior Court*, 56 Cal., 229; *Hurtado v. California*, 110 U. S., 516; *State v. Boswell*, 104, Ind., 541. *In Kalloch v. Superior Court, supra*, the Court says: 'But the Constitution of this State has made provision for this form of prosecution *and the legislature has furnished the machinery to enforce it.* In our opinion the proceeding is a legal and constitutional one.' In *Sloan v. Boswell, supra*, the Court says: 'It seems clear to us that one who is tried and convicted upon an information *provided for by a constitutional state statute* is not deprived of his liberty without due process of law; for we perceive no reason for doubting the soundness of the proposition that proceedings founded upon an information provided for by a *legally enacted statute* do constitute due process of law."

The foregoing propositions seem so fundamentally and axiomatically sound that elaboration or further reference to principle or authority can serve no useful purpose. It was doubtless because of the unassailable logic and law of *State v. Ah. Jim, supra*; to give a practical construction of this provision of the Constitution as not self-executing, and in order to carry it into effect, in harmony with prior and contemporaneous construction and legislation of other States upon this subject, that the Legislature of Idaho during its first session attempted to pass the act known as the Information Act of March 13th, 1891.

SECOND: THE INFORMATION ACT OF MARCH 13th, 1891, WAS AND IS INVALID AND VOID BECAUSE IT WAS NOT PASSED AS REQUIRED BY SEC. 15, ART. III OF THE IDAHO CONSTITUTION. *And herein the court will take judicial notice of the contents of the legislative journals, to ascertain whether the Act was passed according to the forms required by the Constitution to give it validity.*

This appellant was held, tried and convicted under an informa-

tion filed on April 5th, 1897, by the District Attorney of Cassia County, and Sections 8 of Art. I of the State Constitution, supplemented by the Information Act of March 13, 1891, furnish the only authority under which the appellant has been restrained of his liberty and is about to be deprived of his life.

Assuming the correctness of our contention that the constitutional provision is not self-executing, the appellant's trial and conviction was without due process of law, and denied him the equal protection of the laws, and therefore was illegal and void, unless the Information Act was enacted as required by the provision of the Constitution of Idaho relating to the passage of bills.

To this inquiry we now address ourselves:

Section 15, Art. III of the *Idaho Constitution* is as follows:

"No law shall be passed except by bill, nor shall any bill be put upon its final passage until the same, with the amendments thereto, shall have been printed, for the use of the members; nor shall any bill become a law unless the same shall have been read on three several days in each house previous to the final vote thereon; provided, in case of urgency, two-thirds of the House where such bill may be pending may, upon a vote of the yeas and nays, dispense with this provision. On the final passage of all bills they shall be read at length, section by section, and the vote shall be by yeas and nays upon each bill separately, and shall be entered upon the journal; and no bill shall become a law without the concurrence of a majority of the members present."

In *Cohn v. Kingsley*, (Idaho), 49 Pac. Rep. 985, it is held that by the terms of said section, *supra* six things must be done in the passage of a law, to-wit:

"First, the introduction of the proposed law by bill, necessarily in writing; second, the printing of the bill, with the amendments thereto; third, the reading of the bill on three several days, in each house, previous to a final vote thereon; fourth, the reading of the bill on its final passage, section by section; fifth, a vote on the final passage, by yeas and nays; sixth, the concurrence of a majority of the members present."

The Court in that case holds these provisions are mandatory;

that it is the imperative duty of the legislature to obey them; that as each House is required by Section 13, Art. III of the Constitution, to keep a journal of its proceedings, such journal must affirmatively show all of the steps taken in each house in the passage of bills; that such journal is the exclusive evidence of what was done, and cannot be contradicted; and unless the journal shows affirmatively that *all* of the Constitutional requirements were complied with,—the act is void in *toto*.

The fact that the bill was signed by the presiding officers of both houses and approved by the Governor may be *prima facie* evidence that the bill is a valid law, but upon inquiry the Court must nevertheless resort to the journals in order to determine whether the constitutional mandates were all obeyed. Those journals are the one final and conclusive test of due passage. They cannot be altered by presumption, nor varied by consent. Their silence as to due performance of the essential conditions imposed by the organic law is fatal. Though the bill may have been duly signed, enrolled, filed and published, it never became a law unless the unaided journals distinctly show that it had gone through all of the forms provided for in the Constitution.

Examine the House and Senate Journal entries set out on pages .....of the Transcript herein in the light of *Section 15, Art. III, and Section 13, Art. III* of the Idaho Constitution as construed in *Cohn v. Kingsley, supra*, and it is manifest that the act of March 13, 1891, never became a valid law, because:

(a). That said bill, with the amendments thereto, was never printed; that neither the amendment thereto, nor the bill as amended, was ever printed for the use of the members of either the House or Senate of said Legislature; that said bill was put upon its final passage before it, with the amendment thereto, had been printed for the use of the members.

(b). That said bill was not read on three several days in each house previous to the final vote thereon; that said bill as amended was *never* read in said House; that said bill as amended was not read three times in the said Senate before the final vote thereon.

(c). There was no case of urgency shown by any Journal entries, authorizing the said Senate to suspend the constitutional provision of said section requiring bills to be read three times on three several days.

(d). That the three several readings, required by said section of said article of said Constitution was never dispensed with.

(e). That said bill on its final passage in said House was not read "at length," nor "section by section."

(f). That on the final passage of said bill in said House the vote was not by yeas and nays.

(g). That on the final passage of said bill in said Senate the vote was not by yeas and nays.

(h). That there was no yea and nay vote upon the final passage of said bill entered upon the journal of said House and the journal of said Senate.

(i). That a majority of the members present in the said House did not concur in said bill as amended by said Senate; that said bill was never concurred in by a majority of the members present in each house of said Legislature.

(j). That said two houses never agreed or came to a common legislative intent as to the provisions of or on the passage of said bill.

As was said in *Cohn v. Kingsley, supra:*

"If either house can disregard one plain provision of the Constitution, then it may disregard all of its provisions, and the Constitution, instead of being the fundamental law of the land, is a mere sham, an idle mockery, a nullity."

It must be said in regard to the Act of March 13, 1891, as the Court said in *Cohn v. Kingsley*, p. 989:

"The conclusions reached, after a careful and full consideration, are, first: To determine the validity of a statute the Court can and should, in the proper case, go back of the enrolled bill to the journals of both houses, to ascertain whether the requirements of the Constitution were complied with by the Legislature in enact-

ing such statute; second: *The Act in question is void in toto*, by reason of the failure of the journals of the Legislature to show a compliance with the requirements of the Constitution in passing said Act."

The rule that the journals may be looked to in order to ascertain whether Constitutional provisions have been complied with is supported, either absolutely or in a modified form, by Alabama, Arkansas, Colorado, Dakota, Florida, Illinois, Iowa, Kansas, Kentucky, Maryland, Michigan, Minnesota, Missouri, Nebraska, New Hampshirs, Ohio, Oregon, South Carolina, Tennessee, Virginia, West Virginia, Wisconsin and Wyoming—twenty-three soverign states of the Union. (23 Am. & Eng. Ency. of Law, 208). Examination will disclose the fact that in many of the states where the other view is entertained the organic law does not require the journals of the Legislature to show obedience to its provisions, in which case the presumption arising from due authentication is not overthrown by the journals.

We apprehend that here, as elsewhere, Counsel for appellee will contend that the Act of March 13th, 1891, is now valid and operative for two reasons: First, because, although it may not have been passed in accordance with the requirements of the Constitution, it has long been acquiesced in on the part of the people, recognized by the courts, and the Legislature by amendment, and therefore cannot be now held invalid. To sustain this position they will doubtless rely upon *People v. Alturas Co.*, 55 Pac. 1067. Second, because, as they say, the Supreme Court of Idaho has expressly held that it was and is a valid law. To sustain this position they may rely upon *In re Marshall*, 56 Pac., 470.

We respectfully submit that neither of the cases which we assume will be relied upon supports such contentions.

The case of *People v. Alturas County*, 55 Pac., 1067, is not in point. The conclusion reached in that case is expressly based upon a rule of estoppel, demanded by principles of public policy. The Court held there that under the conditions surrounding the case it should not be held subject to the same rules as ordinary acts of legislation. The Court there fully and emphatically repud-

iated the doctrine that a legislative act which is void at the time of its passage, because not passed in the manner required by the Constitution, *can ever ripen into a valid act by the mere lapse of time.*

The ground of that decision was that inasmuch as the Court, in the case of *Blaine County v. Heard*, 45 Pac., 890, had held the Act creating Alturas County constitutional, and the people had acted on the theory that said Act was valid, adjusting their business accordingly, and its valid existence had been recognized by every branch of the State Government, and said county having funded a legal indebtedness inherited from other counties, and sued and recovered as a county, and received from other counties large sums of money,—public policy and sound principles of law required that the State be held *estopped* from questioning the manner of the passage of the Act then in question. In that case property rights and contractual relations were involved, and therefore the doctrine of "estopped" was held applicable. Here it is not.

It is apparent, therefore, that the decision in *People Alturas County*, was made upon points not applicable here, and has no binding force in this proceeding which is between different parties, and upon propositions neither presented nor considered in that case. (*Nickey v. Stearns Ranchos Co.*, 126 Cal., 150; *In re Irrigation Dist.*, 117 Cal., 382; *City Council v. Fowler*, 48 S. C. 8).

In *in re Marshall*, 56 Pas. 470, the constitutionality of the Act of March 13th, 1891, *was not involved*. The question there was whether the Act approved March 6th., 1893,) which amends the Information Act of March 13th, 1891) was passed in the manner rsquired by the Constitution, and the Court refused to decide upon the validity of that amending Act, because that question was not necessary to a determination of the case, and a question involving the construction of the Constitution will not be considered where the case can be determined upon other grounds (*Commissioners v. Mayhew*, 51 Pac., 411, *State v. Ridenbaugh*, 51, Pac., 750; *State v. Baker*, 56 Pac., 81).

It is true that Justice Quarles, in the decision, does say: "If

the Act of March 6th., 1893, is void, the Act of March 13th., 1891, is valid"; but it is clear that he does not mean to be understood as passing upon the constitutionality of either Act. In fact, he expressly declines to consider the question whether the Act of March 6th., 1893, was passed as required by the Constitution, because unnecessary to the decision, and the validity of the other Act was not involved in any manner.

Not being questioned the Court had the right to presume it valid. (*Duncan v. McCall*, 139 U. S., 449; s. c., 11 Sup. Ct. Rep., 576.) But what was said in reference to the Act of March 13th., 1891, was concerning a matter dehors the record and the case, and therefore *obiter dictum*, without weight or binding froce. (*Wis. Centeral R. R Co., v Price County*, 133 U. S., 496.)

In the case of *Cohn v. Kingsley*, 49 Pac. 985, Justice Quarles, both in his original opinion, in July, 1897, and in his opinion on rehearing, in August, 1897, expressly, emphatically, and at great length announced that a law was void because compliance with the constitutional requirements relative to its passage did not affirmatively appear by the Journals of the Legislature; and reiterated his allegiance to those opinions, and reaffirmed the soundness of the principles there laid down in January, 1899, in *People v. Alturas County*, 55 Pac. 1067.

It is an unwarranted affront to his judicial learning and general intelligence to assume that in March, 1899, (*In re Marshall*) he incontinently, unnecessarily and deliberately overruled a case, destroying a legal fabric and annihilated important principles, which he had so shortly before been at such intellectual pains to decide, build and vitalize.

The ruling of an Appellate Court is only authority upon the points expressly raised and expressly passed upon. A mere dictum in an opinion, not essential to the decision, is not authoritative or binding.

Some years ago Congress passed an Act protecting trade marks, Many cases arose under this, and, no question of constitutionality being raised, the Federal Courts adjudicated the rights of parties under it, on the assumption that it was constitutional. (10 Blatch.,

85; 13 Blatch., 458; 11 Blatch., 310; 2 Sawy, 78.

McLean v. Fleming, 96 U. S., 245, was an action to restrain infringement of trade mark under the Act. Injunction granted and the defendant appealed. The Court says, page 248, in affirming the judgment:

"Protection for trade marks may be obtained by individuals, firms and corporations entitled to the same if they comply with the requirements prescribed by the Act of Congress; and the provision is that a trade mark, duly registered as required, shall remain in force thirty years from the date of such registration, subject to an exception not necessary to be noted."

This wou'd seem to be as explicit a recognition of the validity of the Act as could be made short of an express declaration to that effect, yet in the *Trade Mark Cases*, 100 U. S., 82, although the Attorney General cited *McLean v. Fleming*, as affirming the constitutionality of the Act, the Court promptly held it to be unconstitutional.

In the face of this it is idle to claim that a decision of an Appellate Court is authority for anything but the points actually contested, and directly and expressly decided by it.

The rule for the determination of the validity of any act of the Idaho Legislature has been clearly announced and firmly settled by *John v Kingsley*, *supra*. That rule has never since been modified or restricted in its operation, and as stability and certainty in the law are of the first importance, it follows that when a Court has once laid down a principle of law as applicable to a certain state of facts, for the sake of that stability and certainty it will apply that principle to all future cases where the facts are substantially the same. (*Moore v. Albany*, 98 N. Y. 410; *N. W. Forwarding Co. v. Mahaffey*, 36 Kan. 157; *White v. Bruman*, 1 Oh. St, 115.)

The rule in *John v. Kingsley* is that when a contest arises whether an act was constitutionally passed, the journals may be appealed to to settle it, and by the journals the act must stand or fall,—that when the validity of a statute is attacked, the failure of the journals to show that any constitutional requirement was

obeyed is conclusive evidence that such requirement was not obeyed, and the act is therefore unconstitutionally passed and void.

We have attacked the validity of the Act of March 13th, 1891. We have introduced in the record a transcript of the journals of both houses of the Idaho Legislature, certified by the Secretary of State to be full, true and comple. This is the correct, practice, commended by *Cohn v. Kingsley*, p. 989.

The practice of making the journals a part of the record is doubtless commended because of the distinction which that Court recognized between matters of which the Court will take judicial cognizance "immediately, *suo motu*" and those which it will not notice" until its attention has been formally called to them." (Gres. Eq. W., 292,306), when it will investigate so as to refresh its memory and inform its conscience; apply its judicial knowledge, and adopt them as its own evidence, independent of the parties. (*Jones v. United States*, 137 U. S. 102, 216.) The journals are here and the most cursory inspection of their contents demonstrates a startling disregard of the constitutional requirements; that, save as to the original introduction of the act, not a single constitutional mandate was observed in its passage.

By the inexorable logic of the situation the Act of March 13th, 1891 is null and void; void anywhere, everywhere; in any court, State or Federal.

Reviewing the presumptions and adjudications stated, our contentions are:

1. The presumption of validity attaching to a duly certified and regularly enrolled bill may be overthrown by a reference to the journals, and in this case, by such reference, the presumption has been met and overcome by an abundant proof as well as judicial knowledge of invalidity.

2. That the Federal Court cannot be bound by a decision of the Supreme Court of Idaho that the Act of March 13th, 1891 is valid, because no such decision has ever been made. The question of the validity of that Act has never been raised in the State

Supreme Court. But the Federal Court *is* bound to follow the *state rule* that where the legislative journals fail to affirmatively show obedience to the constitutional requirements relating to the passage of bills, the act is void.

If it be said that the state court has not directly declared this particular law—the Act of March 13th, 1891—invalid, the answer is that the Supreme Court of Idaho, in *John v. Kingsley*, has fully developed and finally settled the constitutional requirements of that state relating to the passage of bills; that the state of Idaho in that case has clearly and unmistakably adopted a GENERAL RULE *that no act is valid unless passed as required by Sec. 15 of Art. III of the Stste Constitution*, and that, when questioned, the legislative journals must affirmatively show that the act was passed according to the forms and conditions imposed by the constitution to give it validity; that the state having thus declared its rule for ascertaining whether any act attacked is valid or void, such rule is binding upon and must necessarily be adopted by the courts of the United States, (*Town of South Ottawa v. Perkins*, 84 U. S., 267; *Post v. Supervisors*, 105 U. S., 667; *Railroad Co v. Georgia*, 98 U. S. 357; *Baldwin v. Kansas*, 129 U. S., 52, 57; *N. Y. Life Ins. Co. v. Board of Comm.* 99 Fed. 855; *Norton v. Selby Co.*, 118 U. S., 425; *Claiborne v. Brooks*, U. S., 400—410; that the petitioner has challenged the validity of the Act of March 13th, 1891; the journals are before the court; the facts are uncontroverted—admitted; that the result of those facts is a pure question of law for the court to determine (*Territory v. Clayton*, 18 Pac. 630).

The Supreme Court has said that where such facts appear, or rather that where full observance of the constitutional requirements does not appear, by the journals, the act never became a law.

In *Town of South Ottawa v. Perkins*, 94 U. S., 269, where the due passage of an act of the State Legislature was drawn in question, the court, on p. 268, says:

"When once it became the settled construction of the Constitution of Illinois that no act can be deemed a valid law, unless, by the journals of the legislature it appears to have been regularly

passed by both houses, it became the duty of the courts to take *judicial notice* of the journal entries in that regard, * * * the question of the existence of a law is a *judicial* one, and must be so regarded by the courts of the United States." (Callaghan v. Chipman, 59 Mich. 610, 617; Atty. Genl. v. Rice 64 Mich. 385.)

Hunter v. N. Y. etc. R. R. Co., 116 N. Y. 615

Rudgers v. Cady, 104 Cal. 288.

Comstock v. Tracy, 46 Fed. 162.

So that, independent of the establishment of the fact by proof that the bill was not constitutionally passed, this court judicially knows that the Information Act under consideration was not passed in accordance with the state constitution, and, conformable to the construction given by the highest state court to its constitution, it is void.

The *Railroad Tax Cases*, 13 Fed. 722, was a case involving the validity of a state statute, without which the property of the defendants would have been taken without due process of law. The position of the defendants there was in all respects analogous to, though in some respects not so strong as, that occupied by the petitioner here. There the authority conferred by a constitutional provision which was not self executing was involved; so here. There the statute in question had been passed to furnish machinery for carrying into effect the constitutional provision; so here. There the validity of the particular statute in question had never been considered by the state tribunal; so here. There it was claimed that the statute never became a law because the journals did not show a compliance with the provisions of the state constitution relating to the passage of bills; and so here.

The point of dissimilarity and the situation which makes this case stronger than the California case is that there, under the constitution of 1849, the Supreme Court of that state, in *Sherman v. Story*, *supra*, had decided that an act of the legislature, properly enrolled, autenticated and deposited with the Secretary of State, is a record which is conclusive evidence of the passage of the act, and that the act passed as enrolled. No other rule had been announced in California, but the Federal Court held that as that

state had changed its constitution—had substantially adopted the Illinois constitutional provision relating to the passage of bills.—it must be deemed to have adopted with the provision the settled construction put upon it by the courts of the state from which it was taken, which in Illinois made the journals the final and conclusive test by which the validity of the attacked statute should be ascertained. So that when the *Railroad Tax Cases* were decided by the Circuit Court, the rule that the journals might be examined existed only by presumption, while in Idaho such rule has been clearly and emphatically announced and adopted.

The court examined the journals; ascertained that it appeared therefrom, that they did not show obedience to the constitutional requirements, and by Sawyer, Judge, the same judge who delivered the opinion in *Sherman v. Story*, on page 767, said:

"The bill, therefore, never was constitutionally passed, and never became a law. *Whether the bill became a law or not is a question of law of which the court will take judicial notice. Sherman v. Story, 30 Cal. 253; Ottawa v. Perkins, 94 U. S., 268; Gardner v. The Collector, 6 Wall. 509, 510; Post v. Sup'rs, 105* U. S. 667 Under the decisions of the courts upon constitutional provisions in all respects similar to that in the present constitution of California, *it is settled that the court, to inform itself will look to the journals of the legislature. So the Supreme court of the United States holds where it is so decided by the State Courts in construing their own statutes.* See last cases cited."

The same view is expressed in *County of Santa Clara v. Southern Pac. R. R. Co.*, 18 Fed. 427-8.

The RULE of *Cohn v. Kingsley* that *no* act is valid unless the legislative journals affirmatively show strict obedience to the constitutional mandates relating to its passage, coupled with the demonstrated fact, and judicial knowledge of this Court, that the journals fail to show that the Act of March 13, 1891, was passed (in other words, show that it was not passed) according to the forms required by the State constitution to give it validity,—is the precise equivalent of a decision by the Supreme Court of Idaho that the act in question is void. By *that rule* that act must fall as

unconstitutionally passed, and the Federal Court are as firmly bound by the rule as they would be by an actual decision of invalidity of this particular act. As is said in *Town of South Ottawa vs. Perkins*, 94 U. S. 267:

"It would be a very unseemly state of thing, after the courts of Illinois have determined that a pretended statute of that state is not such, having never been constitutionally passed, for the courts of the United States, with the same evidence before them, to hold otherwise.

It is declared by the Judiciary Act as a fundamental principle 'that the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.' Sec 34. And this Court has always held that the laws of the state are to receive their authoritive construction from the state courts, except where the Federal Constitution and laws are concerned; and the state constitutions in like manner, are to be construed as the state courts construe them This has been so often laid down as the proper rule, and in itself so obviously correct that it is unnecessary to refer to the authorities.

If, therefore, the law in question had never been passed upon by the state courts, the courts of the United States would nevertheless be bound to give to the constitution of Illinois the same construction which the state courts give to it, and to hold a pretended act of the legislature void and not a law which the state courts would hold to be so.

THIRD—THERE BEING NO LAW FOR PROSECUTIONS BY INFORMATION IN CAPITAL CASES, THE STATE COURT WAS WITHOUT JURISDICTION, AND THEREFORE,

FOURTH—THE TRIAL, CONVICTION AND SENTENCE OF PETITIONER WERE ILLEGAL, NULL AND VOID, AND CONTRARY TO THE FOURTEENTH AMENDMENT OF THE FEDERAL CONSTITUTION.

But we are told that because Section 8 of Article I of the Idaho Constitution provides that no person shall be held to answer save

upon indictment *or information*, the District Court which tried the petitioner was not wholly without jurisdiction, and consequently the objection to a trial by information constitutes but mere error which should have been raised in the nisi prius court, and thence by appeal determined by the Supreme Court of the State.

We do not so understand the law. The power of the state court to try persons accused of crime can only be exercised in the manner and under the limitations and restrictions provided by the law.

The Supreme Court of the United States has often determined what constitutes jurisdiction, and what its exercise. The unqualified rule is that where there is no power to hear a cause, there is no jurisdiction; it is *coram non judice* whenever a demurrer on this ground to the case presented should be sustained. Whether on an answer putting in issue the allegations of the complaint, the complainant makes out a case, is the exercise of jurisdiction,—which, however, is only conferred and can only be *properly* exercised under a complaint containing all requisites and filed in the manner required by law.

"The jurisdiction of the court cannot depend upon its decision upon the merits of the cause brought before it, *but upon the right to hear and decide it at all.*" (*Ex parte Watkins*, 7 Pet. 572; *U. S. v. Arredondo*, 6 Pet.. 709; *Rhode Island v. Mass.* 12 Pet. 718; *Kendall v. U. S.* 12 Pet. 623.)

Infractions of the law can only be punished or remedied as authorized by law. The courts derive their power and authority wholly from the law and can proceed no further nor in any other manner than warranted by its provisions. If the law does not confer the power to render judgment *under the pleading filed*, any movement by the court over the subject matter or party is unsupported by law, extra judicial, without jurisdiction, and therefore void.

For example, if, in a civil action, the complaint does not show jurisdiction over the subject matter of a cause in personam, or, if showing jurisdiction, the court proceeds without service upon or

appearance of the defendant as required by law, its judgment is a nullity, as no court can in the ordinary administration of justice, exercise jurisdiction over a party unless he voluntarily appears, or is served with process within the jurisdiction of the court.

In this case, as the constitutional section relied upon is *not* self executing, it remains dormant until vitalized by appropriate legislation, and as no valid law was ever passed to carry it into effect, the court was wholly without power to proceed by information, and hence without any jurisdiction whatever.

In ex parte Milligan, 4 Wall. 2, on habeas corpus to discharge from unlawful imprisonment, the controlling question was:

Upon the facts appearing, had a military commission *jurisdiction* to try, convict and sentence the petitioner Milligan. The court held that the constitutional guaranty of trial by jury had been violated and discharged the prisoner. The inalienable right of every man charged with crime to be tried according to the law of the land is thus stated by Mr. Justice Davis on pp. 118, 119:

"No graver question was ever considered by this court, nor one which more clearly concerns the rights of the whole people; for it is the birthright of every American citizen when charged with crime, to be tried and punished according to law. The power of punishment is, alone through the means which the laws have provided for that purpose, and if they are ineffectual, there is an immunity from punishment, no matter how great an offender the individual may be, or how much his crime may have shocked the sense of justice of the country, or endangered its safety. By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people. If there was law to justify this military trial, it is not our province to interfere; if there was not, it is our duty to declare the nullity of the whole proceedings."

Jurisdiction is not only the power to hear and determine, *(Grignon v. Astor*, 2 How., 338; *ex parte Watkins*, 7 Pet., 572; *U. S. v. Arredondo*, 6 Pet., 709; *State of Rhode Island v. State of Mass.*, 12 Pet., 718; *Kendall v. U. S.*, 12 Pet., 623); but also the power to render the particular judgment actually rendered,—which must

flow from authority conferred by law, and be exercised in accordance with the established modes of procedure (*Windsor v. McVeigh*, 93 U. S., 274, 282, 283; *ex parte Siebold*, 100 U. S., 371.) That is the point here; the power to render the particular judgment rendered in this case,—a power which could be exerted only under, and which did not transcend, the law and established rules of procedure applicable to it; and upon this point it is the case last cited which declares that a conviction under a void law is not merely erroneous, but absolutely void, and can furnish no ground for imprisonment or punishment.

Even should it be assumed that some sort of jurisdiction is conferred by the constitutional authorization to prosecute by information, (which is not the case, because, as we have seen, supplemental legislation is absolutely essential to give any effect whatever to the permissive provision), the trial, conviction and sentence of appellant would still be void because not conducted and imposed by virtue of any established mode of procedure, or according to any rules of law applicable to the case. As a complete answer to the position that any sort of jurisdiction will render any sort of judgment impregnable to collateral attack, we refer to the opinion of *Mr. Justice Field*, in *Windsor v. McVeigh*, supra, where he holds on pp. 282, 283:

"All courts, even the highest, are more or less limited in their jurisdiction. * * * * Thought the court may possess jurisdiction of a cause, of the subject mattter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgment. It must act judicially in all things and cannot transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penetentiary upon the defendant. If the action be for libel or personal tort, the court cannot order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. * * * * The judgments mentioned, given in the cases supposed, would not be

merely erroneous; they would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases. * * * *

So a departure from established modes of precedure will often render a judgment void; thus, the sentence of a person charged with felony, upon conviction by the court, without the intervention of a jury, would be invalid for any purpose. The decree of a court of equity upon oral allegations, without written pleadings, would be an idle act, of no force beyond that of an advisory proceeding of the Chancellor. And the reason is that the courts are not authorized to exert their power in that way."

In short, and for illustration sake, we may say that although a State Superior Court is constitutionally empowered to try and punish persons accused of felony, it can only exercise such power in a manner sanctioned and permitted by the "settled maxims of the law, and under such safeguards for the protection of individual rights" as the law prescribes. The jurisdiction of a court to try a man for murder cannot be arbitrarily exercised; he cannot be tried without a written accusation, nor without a jury, nor otherwise than *within the power and limitations of that jurisdiction.*

But it is unnecessary for us to argue as though the Court only *exceeded* its jurisdiction, because the Idaho Constitution as to prosecutions by *information* amounts to no more than a mere permission to the legislature. That permission or power was never exercised as required by the same Constitution. The attempt made failed, the Constitutional provision remains dormant, and consequently the Courts never required any jurisdiction.

There being no vitalizing statute, and the Constitution being inoperative, there was *no* law for the trial and conviction of appellant by information, and the whole of the proceedings must fall.

In *ex parte Royal* 117 U. S., 248, the Court said:

"It is clear that, if the local statute under which Royal was indicted be repugnant to the Constitution, the prosecution against him has nothing on which to rest, and the entire proceeding against him is a nullity."

Nor can there be any doctrine of waiver or estoppel invoked.

An objection of this character was introduced in the case of *Town of South Ottawa v. Perkins*, 94 U. S., 260, and was thus disposed of by Mr. Justice Bradley:

"We cannot assent to this view. There can be no estoppel in the way of ascertaining the existence of a law. That which purports to be a law of a State is a law, or it is not a law, according as the truth of the fact may be, and not according to the shifting circumstances of parties. It would be an intolerable state of things if a document purporting to be an act of the legislature could thus be a law in one case and for one party, and not a law in another case and for another party, a law to-day and not a law to-morrow; a law in one place, and not a law in another in the same State. And whether it be a law, or not a law, is a judical question, to be settled and determined by the Courts and Judges. The doctrine of estoppel is totally inadmissible in the case."

In cases of a character like the one at bar the principles of estoppel can never be applied. Here no mere right of property, but the sacred right of life and liberty are involved.

"In a criminial case against a party he may waive certain things but he cannot waive a fundamental right affecting the very jurisdiction of the Court to try him. And, even though he may have attempted to waive such right, in a case where he has been found guilty and is imprisoned, he may sue out a writ of habeas corpus, and obtain his release, because he has been tried and convicted without due process of law, and against the Constitution and laws of the United States. Syllabus by the Court in *Ex parte McClusky*, 40 Fed., 72."

In the case just quoted from the petitioner had been charged with larceny by *an information;* was arrainged before the Court, and there pleaded guilty; was sentenced to imprisonment by the Court, and was incarcerated under the judgment when the application for the writ was made. The Court on Pages 74–5 of the opinion says:

"*No man or no power has the right to take away another's liberty, even though with consent, except by due process of law.* Due process of law * * * means compliance by the government with a

fundamental requisite. Such as that the party shall be charged with the crime in the way provided by the Constitution and Laws of the United States. Liberty under such Constitution and Laws is an inalienable prerogative, of which no man by mere agreement can divest himself; any divestiture not occurring by due process of law is null. *(1 Whart. Crim. Law.* (9th Ed.) Sec. 145.)"

FIFTH: HABEAS CORPUS IS THE APPROPRIATE REMEDY, AND THE FEDERAL COURT THE PROPER FORUM WHEREBY AND WHEREIN TO OBTAIN RELIEF.

Where jurisdiction is questioned, a party cannot be estopped or prevented from taking the objection at any time or in any court, for it is an objection which lies at the foundation of the whole case. *(Colemans App., 75 Pa., St., 441, 461; Doctor v. Hartman, 74 Ind. 221; Mathie v. McIntosh, 40 Wis., 120; Thompson v. Steamboat, 2 Oh. St., 26; 12 Am. & Eng. Ency. of Law, 306,307.)*

A judgment entered by a Court without jurisdiction is void, and will be so held in a collateral proceeding. (Dynes v. Hoover, 20 How., (U. S.) 6580).

Jurisdiction may be inquired into by habeas corpus, and the prisoner discharged if no jurisdiction, appears, or if jurisdiction is negatived by the record. *(Ex parte Mirande, 73 Cal. 363).* In *Ex parte Siebold*, 100 U. S. 371, it is well said that:

"An unconstitutional law is void, and is no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment."

There may be no appeal, but

"The question of the Court's authority to try and imprison him may be reviewed on *habeas corpus*,"

Whatever the conflict of authority or disinclination of the courts has been in the past to look into the constitutionality of a statute in habeas corpus proceedings to determine whether a person was lawfully convicted, the uniform practice has been, since the decision quoted from, to entertain jurisdiction for the purposes men-

tioned. In *Ex parte Walter Smith*, 135 Mo. 33 L. R. A. 606, the courts says:

"So that it may now be regarded as the established doctrine of this court that it will interfere by means of the writ of habeas corpus to look into and investigate the constitutionality of a statute or ordinance on which a judgment which results in the imprisonment of a petitioner is founded. *And if it be true, as it must be true, that an unconstitutional law is no law, then its constitutionality is open to attack at any stage of the proceedings, and even after conviction and judgment*, and this is upon the grounds that no crime is shown, and therefore the trial court had no jurisdicrion, because its criminal jurisdiction extends only to such matters as the law declares to be criminal; and if there is no law making such declaration, or, what is tantamount thereto, if that law is unconstitutional, then the court which tries a party for such an assumed offense transcends its jurisdiction, and he is consequently entitled to his discharge, just the same as if the nonjurisdiction of such court should in any other maner be made apparent." (Citing *Church, Habeas Corpus*, 2nd Ed. sec. 83, and cases cited in Note 2; Id. §§ 245 a, 325, 349, 351, 352, and cases cited; *Thompson v. Bunton*, 117 Mo. 83, 20 L. R. A. 462.)

A want of jurisdiction renders every pretended legal proceeding an absolute nullity. Habeas Corpus is the great writ of liberty, and it is its appropriate office to search out defects of jurisdiction whereby any person is sought to be detained in apparent legal custody. As the question of jurisdiction is the especial subject of inquiry in such cases, the writ may always be used to procure the discharge of prisioners where the record of a court of limited jurisdiction does not affirmatively show that jurisdiction was rightfully exercised, or where the record of a court of general jurisdiction, negatives jurisdiction.

Whatever the presumptions as to the regularity and validity of the proceedings of a Superior Court, they are overcome by showing:

1. That it was not proceeding within the general scope of its powers.

2. *That its records state the facts, and such facts are not sufficient to give the Court jurisdiction, or jurisdiction is negative by the record. (Hahn vs. Kelly, 34 Cal. 402, Tustin v. Gaunt,* 4 Oregon, 305; *Greenstreet v. Thornton,* 60 Ark. 374; *Settlemeir v. Sullivan,* 97 U. S., 444; *Richards v. Ladd,* 6 Saw. 40; *Harris v. Hardeman,* 14 How. 334; *Clark v. Thompson,* 47 Ill., 25. S. C., 95 Am. Dec., 457; *Barber v. Morris,* 37 Minn., 104 S. C. 5 Am. St., Rep., 836; *Ray v. Ray,* 1 Idaho, 576; *Pioneer Etc. Co., v. Maddux,* 109 Cal., 640; *Kochler v. Hill,* 60 Iowa, 632; *Davidson v. Clark,* 7 Mont., 101; *Morey v. Morey,* 27 Minn., 267.)

It could serve no useful purpose for appellant to apply to the state rather than the federal tribunal for relief. There is no question of the construction of a state statute involved. The State court has already construed its constitution concerning the passage of bills, and by such construction has imposed upon every court the duty of following such construction. The trial of appellant has been fully concluded and his appeal finally determined, so there is no "ordinary administration of justice" to obstruct. We do not complain now of any infringement of state laws, but do complain, not only that the trial, conviction and sentence of appellant were inconsistent with the freedom of an American citizen and repugnant to the principles of natural justice, but specifically that the fundamental law of the nation has been violated in restraining the petitioner of his liberty without due process of law,—without any jurisdiction whatever, and therefore contrary to the 14th Amendment of the United States Constitution.

It is indisputable that the courts of the United States have power to issue writs of habeas corpus for the power of inquiring into the cause of restraint of liberty of any prisoner who "is in custody in violation of the Constitution or of a law or treaty of the United States." (*Rev. Stats.*, 751, 755, 761; Acts March 2nd, 1883, C. 57, Sec. 7; (4 Stat., 634); Aug. 29, 1842, C. 257; (5 Stat., 439); Feb. 5, 1867, C. 28, Sec. 1; (14 Stat., 385).

As was said by Judge Sawyer in *In re Ah Jow,* 29 Fed. 183. "The party being in custody in violation of the Constitution of the United States, this Court has jurisdiction to discharge him on

habeas corpus notwithstanding the fact that he is held by authority of a judgment of a state court. (*Rev. St., Sec.* 753; *Ex parte Royal*, 117 U. S., S. C., 6 Sup. Ct. Rep., 734); and the case is one in which this Court, in the exercise of a sound discretion, should discharge the petitioner."

"*There are no reasons peculiar to the case that would justify putting the party to the expensive and tedious process of pursuing his remedy through all the Courts; and, if necessary, by appeal to the Supreme Court at Washinguon, 3000 miles away. To require this in a case that seems clear would be equivalent to a total denial of justice.*"

To enforce the Constitution of the United States "does not derogate from the power of the state to execute its laws at the same time and in the same places. The one does not exclude the other, except where both cannot be executed at the same time.

"In that case the words of the Constitution itself show which is to yield. 'This Constitution, and all laws which shall be made in pursuance thereof, * * * * shall be the supreme law of the land.'" (Cunningham v. Neagle, 135 U. S., 1 S. C. 10 Sup. Ct. Rep., 658, 667).

This is not a question of the right of a state to prosecute by information, being authorized by its constitution, and furnished with appropriate and adequate machinery by its Legislature. We cheerfully concede that every State has the right to regulate the forms of pleadings and process in civil and criminal cases, and to determine what shall be deemed a sufficient indictment, information, affidavit, or declaration in its own courts; it may require, in criminal prosecutions, "a statement of the acts constituting the offense in ordinary and concise language" or, "in such manner as to enable a person of common understanding to know what is intended", or permit an offense to be charged "in the language of the statue creating it", or it may demand that "the acts constituting the offense shall be set forth with the same detail and particularly as would be required in indictments by the common law."

In any such case irregularities affecting the prosecution of a defendant would constitute but mere error, which should be raised in the trial court, and determined by appeal in the highest court

of the State. Or if the right to prosecute by information depended upon a *construction* of the state statute, then the Federal Courts might well exercise their discretion against issuing the writ on the ground that such an application would tend to "obstruct the ordinary administration of the criminal laws of the State," as held by Judge Hawley in *In re Huse*, 25 C. C. A. 1.

But here the Constitution of Idaho does not furnish "the details affecting the exercise, jurisdiction and limitations of the procedure, or the rights and pleadings of the State and accused," (*State v. Ah Jim*, 9 Mont. 172), and there is absolutely no State legislation upon the subject, the Act of Marth 13th, 1893, being void.

Can one prosecuting officer adopt the legislative procedure of one state, and another of another; or shall the pleadings in capital cases be arbitrarily formulated to suit the varient fancies of the several district attorneys, or be controlled by the absolute discretion of the *nisi prius* judges of the states? How, when and where shall the information be filed, who will determine its character and sufficiency? Whence come the "uniformity" and "equal protection," pledged by the organic law of the Union? *Equal* protection is the *same* protection under the same circumstances; all are to stand alike in like intrinsic conditions. How can there be equal protection without uniformity of procedure?

With no legislative enactment to carry out the constitutional provision authorizing prosecutions by information, and no settled usages and modes of procedure existing under the common and statute law of England at the time of the immigration of our ancestors, or at the foundation of our government, the fundamental right and immunities guaranteed by the Fourteenth Amendment of the Federal Constitution are immediately and grossly transgressed by such deprivation of liberty as the petitioner here complains of.

We respectfully submit that no rule of comity, no principle of judicial propriety, should require the appellant to appeal to the State Court or prevent this court from declaring that the Constitu-

tion of the United States has been violated, and that appellant must be discharged.

Edgar Wilson,

Respectfully Submitted,
JAMES H. HAWLEY, and
J. W. DORSEY,
of Counsel for Appellant.

2650

No. 286.

Br. of Hays & Borah for Appellee

Office Supreme Court U.S.
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Supreme Court of the United States.

Filed Nov. 26, 1900.

October Term, 1900.

No. 286.

JACK DAVIS, Appellant,

vs.

J. E. BURKE, Sherriff of Cassia County, Idaho, Appellee.

Appeal from the Circuit Court of the United States for the District of Idaho.

BRIEF OF APPELLEE.

SAMUEL H. HAYS,
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AND W. E. BORAH,
For Appellee.

(17768.)

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BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

This is an appeal from an order of the Circuit Court of the United States for the District of Idaho, denying appellant's petition for a writ of habeas corpus.

John C. Wilson was murdered in Cassia County, Idaho, on or about the 17th day of February, 1896. An information charging the appellant, Jack Davis, with the murder of said Wilson was filed April 5th, 1897, in the District Court in and for Cassia County. On April 15th, 1897, appellant was found guilty of murder in the first degree, and on the 24th day of

the same month was sentenced to be hanged June 4th, 1897.

A motion for new trial made to the District Court was denied, an appeal was taken to the Supreme Court of Idaho, and on May 6th, 1898, the judgment of the lower court was, by the Supreme Court, affirmed.

53 Pac. 678. L

On September 12th, 1898, appellant was resentenced, October 28th, 1898, being the day fixed for the execution. An application for pardon had been presented to the State Board of Pardons, and on January 23rd, 1899, said Board denied the application. Thereupon a petition for a writ of habeas corpus was presented to the United States District Judge for Idaho, which petition was denied January 30th, 1899.

An appeal taken from the order denying said writ was, on October 16th, 1899, dismissed by the United States Circuit Court of Appeals.

See Davis vs. Burke, 97 Fed. 501.

At the time of the commission of the offense by appellant, also at the time of the trial, the rendition of judgment, and the original sentence of appellant, the law of the State of Idaho provided that executions of defendants convicted of murder in the first degree should take place at the county jail under the direction of the Sheriff.

Section 8021, Revised Statutes.

While this case was pending before the Circuit Court of Appeals this section of the statute was amended (Laws of 1899, page 340) so as to provide for execution at the State penitentiary under the direction of the Warden. After the passage of this act, which was approved February 18th, 1899, the defendant was removed from the county jail of Cassia County to the State penitentiary.

Subsequently, concluding that this procedure was erroneous, the Sheriff of Cassia County brought a petition for habeas corpus in the Supreme Court of Idaho.—(See 59 Pac. 544.) In this proceeding the Supreme Court decided that the Act of February 18th, 1899, above mentioned, amending certain sections of the Revised Statutes of 1887 regulating the time, place and manner of inflicting the death penalty, construed with Section 159 of the Revised Statutes, was not applicable to past offenses, and that said Davis should be executed in accordance with the law as it stood at the time of the commission of the offense, the trial and the original sentence. In accordance with this decision appellant was returned to the custody of the Sheriff of Cassia County.

After the decision in the Circuit Court of Appeals, and while appellant was awaiting resentence by the State Court, he presented his petition for a writ of habeas corpus to the United States Circuit Court for the District of Idaho, and on the denial of said petition brought this appeal. The chief points which seem to be urged by appellant are:

1. That the Act of the Legislature of the State

of Idaho providing for informations is invalid, for the reason that it was not passed in the manner provided by the Constitution of the State. That the provision of the Constitution of the State providing for informations is not self-operative,and,therefore, the defendant has never been legally charged with a crime.

2. That the Act of February 18th, 1899, providing for executions at the State penitentiary under the direction of the Warden, instead of at the county jail under the direction of the Sheriff, is, as to this defendant, *ex post facto;* and that he can not be executed under Section 8021 of the Revised Statutes as it formerly stood, for the reason that the same has been repealed by the Act of February 18th, 1899.

ARGUMENT.

Replying to the points raised, we say:

That the case as presented by appellant calls for the construction by this Court of the statutes and Constitution of the State of Idaho.

That nearly all of the prosecutions for the last ten years in the State of Idaho have been by information, and that it is extremely unusual to prosecute in any other manner. That in the State Court the validity of the information law remains unquestioned.

Although an appeal was taken to the Supreme Court of Idaho from the judgment of the lower court, and the proceedings of the lower court vigorously assailed, for some reason the question of the validity of the information law was not raised.

Appellant still seems disinclined to present that question to the State Court.

As we understand it the practice is well settled that habeas corpus to review the judgment of a State Court in a criminal case on the ground that some right under the Constitution of the United States has been denied to the person convicted, will not be granted except in a few unusual cases, as the proper remedy is by writ of error.

We invoke that rule here. In the case of the State of New York vs. Eno, 155 U. S. 89, this Court said:

"When the State Court shall have finally acted upon the case the Circuit Court has still a discretion whether under all the circumstances then existing the accused if convicted shall be put to his writ of error from the highest court of the State, or whether it will proceed by writ of habeas corpus summarily to determine whether the petitioner is restrained of his liberty in violation of the Constitution of the United States."

In Whitten vs. Tomlinson, 160 U. S. 231, after calling attention to a number of special cases, this Court said:

"But except in such peculiar and urgent cases the courts of the United States will not discharge the prisoner by habeas corpus in advance of a final determination of his case in the courts of the State; and *even after final determination in those courts* will generally leave the petitioner to the usual and orderly proceeding by writ of error from this court."

In Ex parte Frederick, 149 U. S. 70, in discussing this question, it was said:

"It is certainly the better practice in cases of this

kind to put the prisoner to his remedy by writ of error from this Court under Section 709, Revised Statutes, than to award him a writ of habeas corpus."

In Baker vs. Grice, 169 U. S. 284, it was said:

"The court below had jurisdiction to issue the writ and to decide the questions which were argued before it. Ex parte Royall, 117 U. S. 241; Whitten vs. Tomlinson, 160 U. S. 231. In the latter case most of the prior authorities are mentioned. From these cases it clearly appears as the settled and proper procedure, that while Circuit Courts of the United States have jurisdiction, under the circumstances set forth in the foregoing statement, to issue the writ of habeas corpus, yet those courts ought not to exercise that jurisdiction by the discharge of a prisoner unless in cases of peculiar urgency, and that instead of discharging they will leave the prisoner to be dealt with by the courts of the State; that after a final determination of the case by the State Court, the Federal Courts will even then generally leave the petitioner to his remedy by writ of error from this court."

To the same effect see—

Duncan vs. McCall, 139 U. S. 449.

Tinsley vs. Anderson, 171 U. S. 101.

Markuson vs. Boucher, 175 U. S. 184.

In considering what cases were urgent or special so as to take them out of the operation of the general rule it was said, in Ex parte Royall, 117 U. S. 241:

"When the petitioner is in custody by State authority for an act done or omitted to be done in pursuance of a law of the United States, or of an

order, process or decree of a court thereof; or where, being a subject or citizen of a foreign State, and domiciled therein, he is in custody, under like authority for an act done or omitted under an al leged right, title, authority, privilege, protection or exemption claimed under the commission, or order or sanction of any foreign State, or under color thereof, the validity and effect whereof depend upon the law of nations; in such and like cases of urgency, involving the authority and operations of the general government, or the obligations of this country to, or its relations with, foreign nations, the Courts of the United States have frequently interposed by writs of habeas corpus and discharged prisoners who were held in custody under State authority. So, also, when they are in the custody of a State officer, it may be necessary, by use of the writ, to bring them into a court of the United States to testify as witnesses. The present cases involve no such considerations. Nor do their circumstances, as detailed in the petitions, suggest any reason why the State Court of original jurisdiction may not, without interference on the part of the Courts of the United States, pass upon the question which is raised as to the constitutionality of the statutes under which the appellant is indicted."

In Whitten vs. Tomlinson, above cited, it was said:

"In Ex parte Royall and in New York vs. Eno it was recognized that in cases of urgency, such as those of prisoners in custody, by authority of a State, for an act done or omitted to be done in pursuance of a law of the United States, or of an order or process of a court of the United States, or otherwise involving the authority and operations of the general government, or its relations to foreign na-

tions, the courts of the United States should interpose by writ of habeas corpus."

The cases of Cunningham vs. Neagle, 135 U. S. 1, Thomas vs. Loney, 134 U. S. 372, and Mali vs. Hudson County, Jail Keeper, 120 U. S. 1, were admittedly special cases coming under the exception to the general rule.

As to the reason for the rule, it was said in the case of Royall:

"The Circuit Court was not at liberty under the circumstances disclosed, to presume that the decision of the State Court would be otherwise than is required by the fundamental law of the land, or that it would disregard the settled principles of constitutional law announced by this court, upon which is clearly conferred the power to decide ultimately and finally all cases arising under the Constitution and laws of the United States. In Taylor vs. Carryl, 20 How. 595, it was said to be a recognized portion of the duty of this court (and we will add, of all other courts, National and State) 'to give preference to such principles and methods of procedure as shall seem to conciliate the distinct and independent tribunals of the States and of the Union, so that they may co-operate as harmonious members of a judicial system co-extensive with the United States, and submitting to the paramount authority of the same Constitution, laws, and Federal obligations.' And in Covell vs. Heyman, 111 U. S. 182, it was declared 'that the forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of the other, is a principal of comity, with perhaps no higher sanction than the utility which comes from concord; but be-

tween State Courts and those of the United States it is something more. It is a principle of right and of law and, therefore, of necessity.' "

And again, in Baker vs. Grice, it was said:

"The reason for this course is apparent. It is an exceedingly delicate jurisdiction given to the Federal Courts by which a person under an indictment in a State Court and subject to its laws may, by the decision of a single Judge of the Federal Court, upon a writ of habeas corpus, be taken out of the custody of the officers of the State and finally discharged therefrom, and thus a trial by the State Courts of an indictment found under the laws of a State be finally prevented."

We take it from the authorities cited that the rule is well settled. That the proper remedy is by writ of error from the State Court and that the United States Circuit Court, in the exercise of its discretion, very properly denied the writ. That this case presents no special or peculiar urgency such as would take it out of the general rule. In fact this is particularly a case in which the general rule should be invoked, since this Court is asked here to say that the statute providing for informations in the State of Idaho, under which prosecutions have been conducted for the past ten years, is void, and this before that question has been settled by the State Court. We think this case stands in the same position as Markuson vs. Boucher, and that this Court will decline to examine the other questions raised.

We do not, however, wish to be considered as admitting the unconstitutionality of the Information Act. Section 15, Article III of the Constitution of Idaho is as follows:

"No law shall be passed except by bill, nor shall any bill be put upon its final passage until the same, with the amendments thereto, shall have been printed for the use of the members; nor shall any bill become a law unless the same shall have been read on three several days in each house previous to the final vote thereon: *provided*, in case of urgency, two-thirds of the house where such bill may be pending may, upon a vote of the yeas and nays, dispense with this provision. On the final passage of all bills they shall be read at length, section by section, and the vote shall be by yeas and nays upon each bill separately, and shall be entered upon the journal; and no bill shall become a law without the concurrence of a majority of the members present."

Appellant relies upon the construction placed upon this section by the Idaho Supreme Court in the case of Cohn vs. Kingsley, 49 Pac. 985.

The legislative record of the Act here in question may be briefly summarized as follows: House Bill No. 33 was introduced in the House and read the first time January 7th. Read the second time January 8th, on which day it was also ordered printed. On March 3rd was read the third time, and placed upon its final passage, the ayes and nays being duly taken. It was then transmitted to the Senate. Was read the first time March 3rd. On March 4th it was moved that Section 3 be amended by striking out the words "different offenses and different degrees of the same offense may bejoined in one information in all cases where the same might by different counts in one indictment," which motion prevailed. The bill was then read a second time, the rules were suspended, and it was read a third time and placed

upon its final passage, the ayes and nays being duly taken.

Owing to the striking out of the words above quoted the bill was sent back to the House, where, on March 11th, the amendment striking out the aforesaid words was concurred in. The ayes and nays were not entered upon this motion on the journal. The bill was not reprinted after the words quoted were stricken out, nor was it thereafter read three times on three several days in each House. This is the substance of the objections made by appellant. We insist that these objections do not invalidate the Act. Every word in the law as it now stands was read in each House on three several days and was duly printed. The only change made was the striking out of the words above mentioned. This in no way changed the purpose, object, or scope of the bill. We contend that the decisions of the Supreme Court of Idaho, as they now stand, are such that this Court can not say that there is such a settled rule or policy as requires this Court to hold this Act invalid. The section of the Constitution in question was first construed by the Idaho Supreme Court in the case of State vs. Doherty, 2 Idaho, 1105. In that case the bill in question was subject to all of the objections which were pointed out in this case, with the further objection that the title to the bill was amended by the House, and that after this change the bill was never returned to the Senate for its concurrence. Notwithstanding the objections made the Act was held valid.

The next case upon this question was Cohn vs.

Kingsley, 49 Pacific, 985, upon which appellant relies. This was followed by the case of Brown vs. Collister, 51 Pac. 417, to the same effect. In neither of these cases is any mention made of State vs. Doherty. The question was also presented in People vs. Alturas County, 55 Pac. 1067. This was a proceeding instituted for the purpose of testing the validity of the Act of the Legislature creating Blaine (formerly Alturas) County. In a previous case the constitutionality of the Act had been attacked upon other grounds and had been held valid. The new county had been recognized by executive, legislative, and judicial acts, and the court, after a careful consideration, declined to examine into the manner of the passage of the Act.

State vs. Baker, 56 Pac. 81, is the next case in which the point is raised. It was, however, decided upon other grounds. The case of Marshal, 56 Pac. 470, was a petition for writ of habeas corpus, the grounds alleged in the petition being that the Act amending the Information Act here in question was invalid, the objections urged being substantially the same as are presented here and the record being in a similar condition, but the Court said: "Conceding the facts to be as stated in the petition, the writ must be denied; for it appears that the District Court had jurisdiction, both of the offense and of the person of the petitioner. If the Act of March 6th, 1893, is void, the Act of March 13, 1891, is valid and the only change attempted in it by the Act of March 6th, 1893, is to repeal that part of Section 3 relating to the verification of the Information."

The Act of March 13th, 1891, which is here stated by the court to be valid, is the identical Act which is here in question. The next case involving this constitutional provision is State vs. Mulky, 59 Pacific, 17.

In that case the court said:

"Touching the second assignment of error an inspection of the record shows that it is based upon the idea that the engrossed bill is different from the printed bill. This contention is not sustained by the record. The legislative journals, as shown by the transcript, do not set forth the printed bill, but do show that the bill was printed. The journal of the Senate also shows that one of the senators who opposed the passage of the bill claimed that the bill was not correctly printed for the reason that the word "testifying" in Section 7, appeared as "testimony" in the printed bill. The Senate did not take this view of the matter. Upon the record before us the presumption is that the bill was correctly printed, and this assignment of error is not sustained."

This decision would seem in some respects to modify the doctrine of presumption with regard to the record as laid down in Cohn vs. Kingsley.

The last case in which this question was considered is State vs. McGraw, 59 Pac. 178. This involved an Act of the Legislature defining the crime of rape, being the same statute in question in the case of State vs. Baker, above mentioned. The objections urged in the McGraw case were substantially the same as those urged here. The age of consent in the original bill having been fixed at seventeen years was by amendment changed to eighteen

years. The bill was not, after this amendment, read on three several days in each House. The case as reported does not fully disclose the condition of the record and we therefore, in an appendix to this brief, quote from the original record of the case, the House and Senate journal entries upon which it was urged that the Act was unconstitutional. Upon this record the court said:

"The second error assigned involves the constitutional passage of the Act under which the defendant was prosecuted and convicted. We have examined a certified copy of the House and Senate journals in regard to the passage of said Act. It shows that said bill was duly printed, and read three times in each house; that on its final passage in each house said bill was read at length, section by section, and a yea and nay vote taken thereon, which vote was entered on the respective journals; and that said Act was passed by a majority of the members present in each house. The Act was duly enrolled, signed by the Speaker of the House and President of the Senate, and approved by the Governor. The bill was regularly passed and the court did not err in so holding."

We insist that the Act here in question was considered valid in the Marshal case, and further that this act would not, in view of the decision of the McGraw case, be held invalid by the State Court.

We do not think it necessary to discuss the question whether or not the constitutional provision authorizing prosecutions by information is self-executing or not, other than to suggest that at common law there was a well defined procedure for the prosecution of misdemeanors by information.—

(See Ex parte Wilson, 114 U. S. 417.) That the Constitution gave the right to prosecute in this manner, which amounted merely to an extension of the right previously given at common law, and that there was therefore no necessity for the Legislature to define the procedure to be adopted. The Constitution gave the right and the common law supplied the procedure.

The second point suggested by appellant is that appellant can be executed only under the Act of the Legislature providing for executions at the State penitentiary, and not under the law as it stood at the time of his trial and conviction and original sentence. That question, however, was settled adversely to the contention of appellant in the State Supreme Court in a proceeding to which he was a party (In re Davis, 59 Pac. 544), and this point must therefore be necessarily decided against appellant under McNulty vs. The People, 149 U. S. 645.

In conclusion, we say that the judgment of the Circuit Court should be affirmed for the reason that no abuse of discretion is shown in denying the writ. That it is the well settled practice that the remedy in cases of this kind is by writ of error, and that the State Court should first be given an opportunity to pass upon the validity of the Information Act and construe the State constitutional provisions. That there is no well settled rule of decision in the State Courts upon a record such as this which would require this court to declare the Information Act invalid; but, on the contrary, the decision in the Mc-

Graw case would require the Act to be held valid. That even if the Act were invalid, that the constitutional authorization, aided by the procedure prescribed by the common law, would be a sufficient authorization for prosecutions by information.

That the State Court has construed the State statute with regard to the manner of punishment of the appellant, so that he must be executed under the law in force at the time of the commission of the offense, the trial of the cause, and the rendition of judgment, and that this Court, under the well settled rule, must follow that decision. We therefore say that the judgment and order of the Circuit Court should be affirmed.

Respectfully submitted,

SAMUEL H. HAYS,

Attorney General,

W. E. BORAH,

For Appellee.

APPENDIX.

LEGISLATIVE RECORD IN STATE VS. MCGRAW.

House and Senate Journal Entries of House Bill No. 73, By Neill.

"An Act to amend Section 6765 of the Revised Statutes, so as to raise the age of consent to eighteen years." Passed at the Third, 1895, Session of the Legislature of the State of Idaho.

House Journal.

(January 19, 1895. Page 73.)

Introduction of House Bills, Joint Resolutions and Memorials.

.....

House Bill No. 73—By Neill.

First Reading of House Bills, Joint Resolutions and Memorials.

.....

(Page 74.)

House Bill No. 73—By Neill: A bill for an act to amend Section 6765 of the Revised Statutes, so as to raise the age of consent to seventeen years.

(January 22, 1895. Page 91.)

Second reading of House Bills, Joint Resolutions and Memorials.....

House Bill No. 73—By Neill: Ordered printed and referred to committe on public health.

(January 23, 1895. Page 95.)

Report of Standing Committee.

Boise City, January 23, 1895.

Mr. Speaker:—

Your committee on printing reports that it has printed House Bill No.....73.....

D. GAMBLE,

Chairman.

(January 23, 1895. Page 117.)

Reports of Standing Committees.

Boise City, January 28, 1895.

Mr. Speaker:—

Your committee on public health reports that it has had under consideration House Bill No. 73, by Neill, and suggest that the word "eighteen" be in-

serted instead of the word "seventeen" in line 6, Section 1. The bill is correctly printed and we report the same back with the recommendation that it do pass.

J. J. BENNETT,
Chairman.

Placed on the calendar.
(January 31, 1895. Page 150.)
Committee of the Whole.

. . . . . .

Report of the Committee of the Whole.

. . . . . .

Mr. Speaker:—

The committee of the whole having under consideration House Bill No. 73, having directed me to report the same with amendments by committee on public health, and recommend that the bill do pass as amended.

HENRY,
Chairman.

Report was concurred in.
February 4, 1895. Page 162.)
Reports of Standing Committees.
Boise City, February 4, 1895.

Mr. Speaker:—

Your committee on engrossment reports that it has had under consideration House Bills Nos..... and 73, and report the same correctly engrossed.

VANCE,
Chairman.

Adopted.
(February 5, 1895. Page 177.)
Boise City, February 5, 1895.

Mr. Speaker:—

Your committee on printing reports that it has had printed in its amended form House Bill No. 73.

D. GAMBLE,
Chairman.

Third Reading House Bills, Joint Resolutions and Memorials.

House Bill No. 73—By Neill: An Act to amend Section 6765 of the Revised Statutes, so as to raise the age of consent to eighteen years.

Was read a third time.

The question being "shall the bill pass?"

The ayes and nays were taken with the following result:

Yes—Messrs. Brown, Bennett, Baxter, Cowden, Crane, Clark, Daley, Davis, Elder, Fletcher, Gamble, Glenn, Henry, Hicks, Johnson, Monroe, McCarthy, McMillan, Neill, Randolph, Rowton, Smith, Sanders, Thompson, Thomas, Verbeck, Warring, Walker, Wyman, Walters, Young, N. H. Young, James D., Mr. Speaker—33.

No—None.

And so the bill passed.

The title was read and approved.

(February 18, 1895. Page 263.)

Message from the Senate.

Office of the Secretary of the Senate,
Boise City, February 18, 1895.

Mr. Speaker:—

I am directed by the Senate to inform your honorable body that the Senate has had under consideration and passed: House Bill No. 73—by Neill. "An Act to amend Section 6765 of the Revised Statutes, etc."....

Respectfully,
J. M. WELLS,
Secretary.

(February 19, 1895. Page 269.)

The Speaker announced that he was about to sign House Bill No. 73, by Neill. An Act to amend Section 6765 of the Revised Statutes, so as to raise the age of consent to 18 years.

(Page 274.)

Boise City, February 19, 1895.

Mr. Speaker:—

Your committee on enrollment report that they have had correctly enrolled House Bill No. 73, entitled, "An Act to amend Section 6765 of the Revised Statutes, so as to raise the age of consent to 18 years and presented the same to the Governor at 2:15 o'clock p. m., February 19, 1895.

N. H. YOUNG,
Chairman.

(Page 276.)

Message from the Governor.

Executive Office, State of Idaho,
Boise City, February 19, 1895.

Mr. Speaker and Members of the House of Representatives, Idaho Legislature:—

Gentlemen:—I have this day signed House Bill No. 73, by Neill, that being "An Act to amend Section 6765 of the Revised Statutes, so as to raise the age of consent to eighteen years."

Very respectfully yours,
W. J. McCONNELL,
Governor.

SENATE JOURNAL.

(February 5, 1895. Page 157-158.)

Message from the House.

. . . . . .

Office of the Chief Clerk of the House of Representatives, Boise City, Idaho.

Mr. President:—

I am instructed to inform your honorable body that the House of Representatives has had under consideration and passed House Bill No. 73, by Neill, which is herewith transmitted,

Respectfully,
JAS. H. GWINN,
Chief Clerk.

H. B. No. 73, by Neill, filed for first reading.

(February 6, 1895. Page 161.)

Introduction and First Reading of Bills.

. . . . . .

H. B. No. 73, by Neill.

An Act to amend Section 6765 of the Revised Statutes so as to raise the age of consent.

Read for a first time and referred to committee on State affairs.

(February 7, 1895. Page 165.)

Reports of Standing Committees.

Boise City, February 7, 1895.

Mr. President:—

Your committee on State Affairs respectfully report that they have had under consideration H. B.

No. 73, by Neill, and recommend that the same do pass.

ROUNDS,
Chairman.

H. B. No. 73 placed on calendar.

(February 9, 1895. Page 176.)

Report of Committee of the Whole.

Boise City, February 9, 1895.

Mr. President:—

Your committee of the whole respectfully report that they have had under consideration.....H. B. No. 73, by Neill, and recommend that it do pass as amended.....

MYER,
Chairman.

On motion of Senator Myer the report of the committee of the whole was adopted.....

H. B. No. 73. Amendments ordered printed and when printed bill ordered filed for second reading.

(February 11, 1895. Page 179.)

Second Reading of Bills.

H. B. No. 73 read for a second time and recommitted to the committee on judiciary.

(February 15, 1895. Page 199.)

S. B. No. 73 was, by consent, taken out of the hands of the judiciary committee and referred to the committee on State affairs.

(February 16, 1895. Page 202-203.)

Reports of Standing Committees.

Boise City, February 16, 1895.

Mr. President:—

Your committee on State affairs respectfully report that they have had under consideration H. B. 73, by Neill, and recommend that the amendment as proposed by the committee of the whole be not adopted, and that the bill do pass.

ROUNDS,
Chairman.

Amendments to House Bill No. 73 proposed by the committee of the whole.

First Amendment.

In title of the bill, before the word years, strike out the word "eighteen" and insert "sixteen."

Second Amendment.

Also in Section 1, under first, strike out "eighteen," insert the word "sixteen."

H. B. No. 73, by Neill. Report of the committee on State affairs adopted, and original bill filed for second reading.

(February 18, 1895. Page 208.)

Third Reading of Bills.

H. B. No. 73, by Neill.

Read a third time and placed upon its final passage.

The President stated the question, "Shall the bill pass?"

Roll called and the bill passed by the following vote:

Voting aye—Senators Boyce, Cunningham, Day, Dewey, Golden, Hanrahan, Heitfeld, Millner, Myer and Parkinson, Rees, Robertson, Rounds, Smith, Steen, President pro tem. Bierbower—16.

Title read and approved and bill transmitted to the House

(February 19, 1895. Page 216.)

The President announced that he was about to sign.....H. B. No. 73.

Supreme Court of the United States.

No. 286.—October Term, 1900.

Jack Davis, Appellant,
vs.
James E. Burke, Sheriff, &c.
} Appeal from the Circuit Court of the United States for the District of Idaho.

[December 17, 1900.]

This was an appeal from an order denying a writ of *habeas corpus* to the appellant Davis, who was, on April 15, 1897, found guilty of murder in the District Court of Cassia County, Idaho, and sentenced to be hanged June 4, 1897.

Motion for a new trial was denied, an appeal taken to the Supreme Court of Idaho, and on May 6, 1898, the judgment of the lower court was affirmed. (53 Pac. Rep. 678.)

His execution having been postponed, an application for pardon was presented to the State Board of Pardons, and was denied January 23, 1899. Thereupon a petition for a writ of *habeas corpus* was presented to the United States District Judge for Idaho, which was denied January 30; and an appeal taken from this order was on April 16, 1899, dismissed by the Circuit Court of Appeals, (*Davis* v. *Burke*, 97 Fed. Rep. 501,) upon the ground that, as the appeal involved a construction of the Federal Constitution, that court was without jurisdiction.

Section 8021 of the Revised Statutes of Idaho provides that executions of defendants convicted of murder in the first degree shall take place at the county jail under the direction of the sheriff; but while this case was pending before the Circuit Court of Appeals this section of the statute was amended, (Laws 1899, page 340,) so as to provide for the execution of criminals at the State penitentiary under the direction of the warden. After the passage of this act, February 18, 1899, Davis was removed from the jail of Cassia County to the State penitentiary.

Upon being advised that this proceeding was erroneous, Burke, the sheriff of Cassia County, applied to the Supreme Court of Idaho for a writ of *habeas corpus*. That court decided that the act of February 18, 1899, above mentioned, regulating the time, place and manner of inflicting a death penalty, was not applicable to past offenses, and that Davis should be executed in accordance with the law as it stood at the time of the com-

mission of the offense, the trial and original sentence. (59 Pac. Rep. 544.) In accordance with that decision appellant was returned to the custody of the sheriff.

After the decision in the Circuit Court of Appeals, and while awaiting a re-sentence by the State court, appellant presented this petition for a writ of *habeas corpus* to the Circuit Court of the United States for the District of Idaho, and upon the denial of such petition appealed to this court.

Mr. Justice BROWN delivered the opinion of the Court.

The assignments of error, which are somewhat voluminous, are practically resolvable into two questions, first, whether the petitioner was legally prosecuted by information, and, second, whether the act of February 18, 1899, providing for executions at the State penitentiary under the direction of the warden, is as to this defendant *ex post facto*, and, as dependent upon this, whether he could be executed under section 8021 of the Revised Statutes as it formerly stood, after that section had been repealed by the act of February 18, 1899.

(1.) The Constitution of Idaho contains the following clause: "Art. 1, Sec. 8. No person shall be held to answer for any felony or criminal offense of any grade, unless on presentment or indictment of a grand jury, or on information of the public prosecutor, after a commitment by a magistrate." Appellant's answer to this is: (1.) That the provision is not self-executing. (2.) That a law passed March 13, 1891, known as the Information act, is void, because it was not passed in the manner required in the Idaho constitution, and that the journals of the legislature may be resorted to to determine this question.

In reply to his first contention, it is sufficient to say that this case has been twice before the Supreme Court of Idaho, and upon neither occasion was the point made that it could not be prosecuted by information. The first time it was carried there by appeal from the judgment of the lower court, following a trial upon the merits, and was there affirmed. (53 Pac. Rep. 678.) After conviction, and after the surrender of Davis by the sheriff to the warden of the penitentiary, in pursuance of the act of February 18, 1899, the sheriff made an original application to the Supreme Court for a writ of *habeas corpus* to obtain the custody of Davis, who had been surrendered to the warden of the penitentiary. This was granted. (59 Pac. Rep. 544.) Upon the hearing of that case, counsel, who were admitted to appear on behalf of the prisoner as *amici curiæ*, insisted that the provisions of the Revised Statutes for the execution of prisoners having been repealed, and the provisions of the act of February 18, 1899, being *ex post facto*, there was no law under which Davis could be

executed; but no question was made as to the validity of prosecutions by information.

The rule is well settled in this court that, while there may be a power on the part of the Federal courts to issue a writ of *habeas corpus* where the petitioner insists that he has been deprived of his liberty without due process of law, that power will not ordinarily be exercised until after an appeal made to the State courts has been denied. (*Ex parte Royall*, 117 U. S. 241; *Ex parte Fonda*, 117 U. S. 516; *In re Duncan*, 139 U. S. 449; *In re Wood*, 140 U. S. 278; *Cook* v. *Hart*, 146 U. S. 183; *In re Frederich*, 149 U. S. 70; *New York* v. *Eno*, 155 U. S. 89; *Whitten* v. *Tomlinson*, 160 U. S. 231; *Baker* v. *Grice*, 169 U. S. 284; *Markuson* v. *Boucher*, 175 U. S. 184.)

Certain exceptional cases have arisen in which the Federal courts have granted the writ in the first instance, as where a citizen or subject of a foreign state is in custody for an act done under the authority of his own government; or an officer of the United States has been arrested under State process for acts done under the authority of the Federal government, and there were circumstances of urgency which seemed to demand prompt action on the part of the Federal government to secure his release. (*Wildenhus's Case*, 120 U. S. 1; *In re Loney*, 134 U. S. 372; *In re Neagle*, 135 U. S. 1.) It is recognized, however, that the power to arrest the due and orderly proceedings of the State courts, or to discharge a prisoner after conviction, before an application has been made to the Supreme Court of the State for relief, is one which should be sparingly exercised, and should be confined to cases where the facts imperatively demand it. While the power to issue writs of *habeas corpus* under R. S. sec. 753, nominally extends to every case where a party "is in custody in violation of the Constitution, or of a law or treaty of the United States," it is not every such case where the interference of the Federal court is demanded, particularly where the State court is executing its own criminal laws, and is asserting a jurisdiction which does not reside elsewhere, to try an accused person for a violation of such laws. The State courts are as much bound as the Federal courts to see that no man is punished in violation of the Constitution or laws of the United States; and ordinarily an error in this particular can better be corrected by this court upon a writ of error to the highest court of the State than by an interference, which is never less than unpleasant, with the procedure of the State courts before the petitioner has exhausted his remedy there.

This case is peculiarly one for the application of the general rule. Not only was there ample opportunity for making this defense upon the original hearing in the Supreme Court, or upon an independent application for a writ of *habeas corpus;* not only does the question involve the construction

of the Constitution and laws of the State with which the Supreme Court of the State is entirely familiar, but a ruling by this court that prosecutions by information in the courts of Idaho are invalid might result in the liberation of a large number of persons under sentence upon convictions obtained by this method of procedure. A step so important ought not to be taken without full opportunity given to the State court to pass upon the question, and without clear conviction of its necessity.

(2.) But we are also of opinion that for the purposes of this case the provision of the Idaho constitution must be deemed self-executing. The rule is thus stated by Judge Cooley in his work upon Constitutional Limitations (p. 99): "A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law. Thus, a constitution may very clearly require county and town government; but if it fails to indicate its range, and to provide proper machinery, it is not in this particular self-executing, and legislation is essential."

Where a constitutional provision is complete in itself it needs no further legislation to put it in force. When it lays down certain general principles, as to enact laws upon a certain subject, or for the incorporation of cities of certain population, or for uniform laws upon the subject of taxation, it may need more specific legislation to make it operative. In other words, it is self-executing only so far as it is susceptible of execution. But where a constitution asserts a certain right, or lays down a certain principle of law or procedure, it speaks for the entire people as their supreme law, and is full authority for all that is done in pursuance of its provisions. In short, if complete in itself, it executes itself. When a constitution declares that felonies may be prosecuted by information after a commitment by a magistrate, we understand exactly what is meant, since informations for the prosecution of minor offenses are said by Blackstone to be as old as the common law itself, and a proceeding before magistrates for the apprehension and commitment of persons charged with crime has been the usual method of procedure since the adoption of the Constitution. It is true the legislature may see fit to prescribe in detail the method of procedure, and the law enacted by it may turn out to be defective by reason of irregularity in its passage. In such case a proceeding by information might be impeached in the State court for such irregularity, but it certainly would not be void so long as it was authorized by the Constitution. For us to say that the accused had been denied due process of law would involve the absurdity of holding that what the people had declared to be the law was not the law.

(3.) The question whether appellant shall be executed under the act of the legislature by the warden of the penitentiary, or under the Revised Statutes, as the law stood at the time of his trial and conviction, by the sheriff, or whether he shall escape punishment altogether, was determined adversely to him by the Supreme Court of the State, (59 Pac. Rep. 544,) and involves no question of due process of law under the Fourteenth Amendment. (*McNulty* v. *California*, 149 U. S. 645.)

The order of the Circuit Court of the United States for the District of Idaho denying the writ of *habeas corpus* is therefore

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.